EDITOR'S NOTE

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NO. 75-5731

ORIGINAL

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE APPEALS COURT IMPROPERLY APPLIED SWAIN v. ALABAMA, 380 U.S. 202 (1965) TO THE CASE AT BAR, WHEREIN THE PROSECUTOR ADMITTEDLY EXCLUDED BLACKS SOLELY UPON THE BASIS OF RACE AND THEREBY CREATED CONFLICT WITH THE APPELLATE COURT IN McCRAY V. ABRAMS, 750 F.2d 1113 (2nd Cir. 1984); AND WHETHER SWAIN, SUPRA, OUGHT BE REVISED.

II.

WHETHER THE APPEALS COURT IMPROPERLY HELD IT PERMISSIBLE TO ALLOW "SIMILAR FACT EVIDENCE" FOR PURPOSES OF SHOWING PROPENSITY IN DRUG TRAFFICKING CASES.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO.

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, WILLIE DAVIS BROWN a/k/a WILL BROWN [and hereinafter BROWN], requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in United States of America v. Brown, ___ F.2d ___, entered 20 August 1985.

OPINION BELOW

On 20 August 1985, the Court of Appeals filed its opinion affirming the conviction of the Petitioner for conspiracy in drug related activity. Said opinion was "corrected" by the Court on

Page "6", on 28 August 1985. A copy of the opinion, together with the correction is attached as Appendix A. A Petition for Rehearing or to Certify Conflict, Appendix B, dated 27 August 1985, was denied by the Court by Order dated 12 September 1985. A copy of that opinion is attached hereto as Appendix C.

JURISDICTION

On 20 August 1985, as noted above, the United States Court of Appeals for the Tenth Circuit entered its judgment affirming the Petitioner's conviction for conspiracy to violate Title 21, United States Code § 841(a)(1). Petition for Rehearing was denied on 12 September 1985. The jurisdiction of this Court to review the decision of the Appeals Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

SIMILAR CASE PENDING

The Petition would give notice to the Court that as to that which is presented in Question 1, a similar issue is presently before the Court in Batson v. Kentucky, Case No. 84-6263.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be . . . deprived of life, liberty, or property without due process of law.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

For purposes of this section of the Petition, an adequate summary of the factual and evidentiary materials are contained in the main decision of the Appellate Court, the Petition For Rehearing, and the opinion thereon. However, the Petitioner will amplify somewhat the facts of the case as it relates to the two questions raised in the argument below.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE APPELLATE COURT FINDING THAT A SHOWING OF "SYSTEMATIC AND INTENTIONAL CONDUCT ON THE PART OF THE GOVERNMENT CALCULATED TO EXCLUDE BLACKS FROM JURIES" IS NECESSARY, CREATES CONFLICT WITH OTHER CIRCUITS, AND FURTHER, UNDER THE UNUSUAL FACTS OF THE INSTANT CASE SWAIN, SUPRA, OUGHT BE MODIFIED.

The Petitioner must delineate certain factual occurrances at trial in addition to those set forth by the Appeals Court regarding the circumstances of the jury empanelled to hear the Petitioner's trial. While other matters occurred that are in the same area of the jury exclusions complained of, the Petitioner will limit himself to that directly addressed by the Appellate Court.

The Appeals Court set forth the following as its factual statement:

> *"Only the defendant and Samuel Ponder were ultimately tried for the drug con-*

> *spiracy. Ponder was represented by a prominent member of the Oklahoma State Senate who is a black man. Both the defendant and Ponder are also black. During the jury selection stage, the government excused all black venier members through preemptory challenges. Evidence during the second day of jury selection showed that Mr. Ted Richardson, the prosecutor, told the jury clerk that: 'We would like to have as few black jurors as possible.' The jury clerk told the district judge in chambers that she was not influenced by Richardson's request. The government preemptorily excused all prospective black jurors."*

The jury clerk, however, testified that Richardson told her he wanted no blacks on the jury. [See: A. D, pp. 6,7,49-51]. What the Appellate Court failed to include [even after Petition For Rehearing] and what is, at the least, most cogent to the issue at hand, is the testimony of the prosecutor at a hearing to determine the effect, if any, of his conduct upon the trial. [This hearing was had while the jury was deliberating]. Mr. Richardson stated that he did make the call to the jury clerk making inquiry, according to him, regarding the number of blacks in the panel to be called. He stated he had excused blacks, and he then related a story wherein he and co-counsel Porter tried a case that purportedly had a hung jury split along racial lines. He continued,

> *"And so all I'm telling the Court is that I did take into consideration the fact that these people were black and that almost everybody -- I would think they would be an incompetent juror, almost, if they were from this area and didn't know Senator Porter."* [emphasis supplied].

The prosecutor then admitted he excused a black juror that stated she could be fair and would not be influenced by Senator Porter. He further made clear that he excuses black jurors whenever Porter is involved in a case [See: A. D, pp. 19,20]. Thus, the prosecutor, by his own statements, excused blacks because the Defendants were black and one of their counsel were black, despite their being otherwise qualified.

Too, the Petitioner requested that the trial court allow him a few additional challenges in an effort to perhaps seat a black juror from those remaining in the panel; this request was denied.

As an aside and before argument, the Appellate Court issued what it denominated a "corrected Page 6" to the opinion. In that corrected opinion, the Court recites that Petitioner suffered no prejudice because he was not immediately informed of the inappropriate contact between the prosecutor and the jury clerk concerning race of venire members. The corrected opinion states, "Later the trial judge explained the matter to the jury and did so thoroughly". To the undersigned's knowledge, this just did not happen. Counsel were not informed until long after the two days of deliberation had begun, and at no time did the trial judge ever explain this matter to the jury. This statement by the Appellate Court is in error. The Petitioner claimed prejudice by not being immediately told of this action so as to employ the same in rebuttal to certain arguments.

As to the exclusion issue, the Appeals Court held:

> *"This Circuit has previously held that the appropriate analysis for a claim that a defendant's right to an impartial jury has been violated is the framework articulated in Swain. United States v. Jenkins, 701 F.2d 850, 860 (10th Cir. 1983). This Court therefore requires a showing of 'systematic and intentional conduct on the part of the government calculated to exclude Blacks from juries' Id. In the present case, there has been no showing that the prosecution was responsible for excluding blacks in 'case after case', Swain, supra, at 223. Because the defendant has not met this threshold requirement, we must conclude that he has no valid claim of an unconstitutional use of the preemptory challenge. Jenkins, supra, at 860."*

For several reasons, the Petitioner respectfully suggests error occurred. As the Petitioner has pointed out, a case of similar import is pending before this Court [Batson v. Kentucky]. And, while certiorari was denied in McCray v. New York, ___ U.S. ___, 103 S.Ct. 2438 (1983), five members of the Court, including two Justices who would have granted certiorari, clearly acknowledged that the issue would have to be addressed by the Court after the State Court "serve as laboratories in which the issue receives further study before it is addressed by this Court", 103 S.Ct. at 2439. The Court further noted that at least at that time, there were "no conflict of decision within the Federal system" as to "whether the Constitution prohibits the use of preemptory challenges to exclude members of a particular group from a jury, based on the prosecutor's assumption that they will be based in favor of other members of the same group", Id. at 2439.

Batson, supra, has obviously served as the "State Court laboratory".

Conflict also now exists "within the federal system".

Conflict began parenthetically, as far as can be determined in a footnote in United States v. Green, 742 F.2d 906 (11th Cir. 1984), wherein the Court authored the following:

> *"Green is not entitled to a jury which necessarily includes blacks merely because he is black*" Id. at 611.*

The Court's asterisk, however, refers the reader to the following language:

> *"On the other hand, Green may have the right not to have blacks systematically and intentionally excluded from the pool of prospective jurors in his case by prosecutors or other court officials motivated by a desire to place him at a disadvantage before the jury. Willis v. Zant, 720 F.2d 1212 (11 Cir. 1983). Furthermore, when the prosecutor employs its pre-emptory challenges to remove from jury participation all black jurors, the defendant's right to be tried by a jury drawn from a 'representative cross section of the community' may be effectively denied. This right is probably denied to the same extent it would have been had blacks not been included on the jury lists at all. See: Harris v. Texas, ___ U.S. ___, 104 S.Ct. 3556, 82 L. Ed.2d 858 (1984) (Marshall, J., dissenting) (citing Taylor v. Louisiana, 419 U.S. 522, 528, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975)."* [Emphasis supplied].

Next to address the issue was the Fifth Circuit in United States v. Leslie, 759 F.2d 366 (5th Cir. 1985). In that case, the prosecutor used his preemptory challenges against the black jurors

who were called to sit in Leslie, a black man's case, to which the defendant objected. The prosecutor stated he was not employing his challenges for racial reasons, and offered to explain his reasons. The trial court stated that was not necessary and denied Leslie's Motion for Mistrial. After tracing the duties of the prosecutor, the theories of the supervisory powers of the Court, and the duties of the district, the Court, employing its supervisory powers, remanded for an evidentiary hearing upon the prosecutor's challenges, stating:

> " *This Court by no means intends to emasculate the wide latitude and discretion federal prosecutors enjoy in exercising peremptory challenges in future criminal cases. Nor do we suggest that a criminal defendant has a right to a jury containing all of the economic, social, religious, racial, political, and geographical groups of the community. See Apodaca v. Oregon, 406 U.S. 404, 413, 92 S.Ct. 1628, 1634, 32 L.Ed.2d 184 (1972); Swain, 380 U.S. at 208, 85 S.Ct. at 829, Ballard, 329 U.S. at 192, 67 S.Ct. at 263; Thiel, 328 U.S. at 220, 66 S.Ct. at 985. Although the historical roots of the peremptory challenge in the American system of justice run deep, peremptory challenges are not commanded by the Constitution. See McCray v. New York, 461 U.S. 961, 102 S.Ct. 2438, 2442 n. 7, 77 L.Ed.2d 1322 (Marshall, J., dissenting from denial of certiorari); Rosales-Lopez v. United States, 451 U.S. 182, 188 n. 6, 101 S.Ct. 1629, 1634 n. 6, 68 L.Ed.2d 22 (1981); Swain, 380 U.S. at 219, 85 S.Ct. at 835. In the exercise of our supervisory power and in the interest of justice, therefore, we conclude that the federal prosecutor's precious, though not absolute, right to employ peremptory*

challenges without review must yield in those cases where the defendant can establish that the prosecutor misused those challenges and engaged in invidious racial discrimination.[5]

By resting our holding upon our supervisory power over federal district courts and federal prosecutors we, of course, need not and therefore do not consider whether the prosecutor's conduct in this case violated any of Leslie's constitutional rights. We note, however, that several federal appellate courts and state supreme courts recently have addressed the claim that a defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community as established in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690, (1975), necessarily prevents a prosecutor from striking venieremen solely because of their race.[6]"

The footnote of the Court then directs the reader to certain of these cases.

Cogent also is that the Leslie Court alludes to the fact that other Federal Courts have employed their supervisory powers "to ensure that federal prosecutors do not employ preemptory challenges to engage in racial discrimination" Id. footnote 4 citing to, inter alia, United States v. Jackson, 696 F.2d 578, wherein the trial court, due to a serious question of the prosecutor's office in the Western District of Missouri striking all or most black veniremen or juries with black defendants, required the prosecutor to show good cause before striking a black or minority; United States v. Nelson, 529 F.2d 40 (8th Cir. 1976); United States v. McDaniels, 379 F.Supp. 1243 (E.D.L.A. 1974); and compare Hall v.

United States, 168 F.2d 161 (D.C. Cir. 1947).

After denial of certiorari in McCray v. New York, supra, the Defendant, McCray, sought relief by Writ of Habeas Corpus in the United States District Court, which was conditionally granted, and the State of New York appealed to the Second District Court of Appeals. That Court, as a result, authored McCray v. Abrams, 750 F.2d 1113 (1984), cert. denied 105 S.Ct. 2318 (1985).

The opinion of the Tenth Circuit in the instant case is, it is submitted, in utter conflict with McCray, supra.

While arising out of a state prosecution [as did Swain v. Alabama], the Court based its decision upon Sixth Amendment grounds. The Court traced the evolution of the racial issue, and addressed Swain v. Alabama, supra, noting that this Court found Swain had not met the burden established by the Court to challenge the actions of the prosecutor. The Second Circuit then noted, "Not surprisingly, almost no other defendant in the nearly two decades since the Swain decision have met this standard of proof either" McCray, supra, at 1120.

The McCray Court then further traced the evolution of the law vis a vis the Sixth Amendment and held, inter alia, that the prosecutor's employment of preemptory challenges to excuse jurors solely on the basis of their racial affiliation was improper, and further that the Courts should decide "each case on the basis of the acts or practices complained of in that very case, and not to require the defendant to show, as Swain requires for an equal protection claim, that those acts or practices have had un-

desirable effects in case after case." Id. at 1130. The Court then went on to apply the law to the facts in McCray, which depicted an instance of the defendant having "made a prima facie showing that the prosecutor exercised the State's preemptory challenges to exclude black and Hispanic jurors on the basis of their group affiliation" Id. at 1133.

So finding, the Court remanded for a hearing to apparently allow the State an opportunity to rebut the unsonstitutional action by showing "that neutral selection criteria and procedures have produced the monochromatic results" Id. at 1132 quoting Castaneda v. Partida, 430 U.S. 482, 494 (1977), which quoted several other cases.

The Tenth Circuit, in the case at bar, began its opinion as to this issue thusly:

> *"Second, we consider whether the government's use of preemptory challenges to exclude all potential black jurors, combined with the prosecutor's request to the jury clerk concerning the racial composition of the jury violated the defendant's right to an impartial jury."*

The Court referred to Swain as quoted above, and held that a showing of systematic and intentional conduct must be shown, and held that the Petitioner had not met the threshold requirement.

As noted above, the prosecutor, in addition to what the Tenth Circuit authored, admitted he excused qualified blacks on the basis of race. This, coupled with the phone call to the jury clerk, as told by the jury clerk, and the exclusion of all blacks, it is submitted, warranted a new trial.

The Writ of Certiorari ought issue to review the decision of the Tenth Circuit in light of the evolving Sixth Amendment decisions in the present issue, as well as for the conflict with McCray. Further, due to the unusual circumstances of this case vis a vis the actions of the prosecutor, the Writ ought issue to determine whether, in certain instances, the systematic exclusion requirement of Swain ought be modified.

II. THE APPEALS COURT IMPROPERLY HELD IT PERMISSIBLE TO ALLOW "SIMILAR FACT EVIDENCE" FOR PURPOSES OF SHOWING PROPENSITY IN DRUG TRAFFICKING CASES.

After capsulizing the Petitioner's complaint about the admission of what was supposed to be similar fact evidence, to wit: the Petitioner's arrest on a marijuana charge in 1980 [to be further discussed below], the Court stated: "We conclude that the district judge properly allowed evidence of the arrest to be admitted for propensity purposes.". The Court then noted the purpose of Federal Rule of Evidence 404(b) and found the act within that ambit and held that the trial court's limiting instruction cured any prejudice.

The Petitioner was declared indigent for purposes of appeal, and the undersigned had to send the Record back to the Clerk of the Court upon completion of the Brief, so that that portion of the testimony which dealt with the "404(b)" issue cannot be appen-

dicized. However, the Petitioner is going, with the indulgence of the Court, to quote from his Appeal Brief as to what facts constituted the "404(b)" testimony [See A. E, being Point One of Appellant's Brief]:

> *" During the course of trial, however, the government offered as a witness Ralph Hernandez, a deputy sheriff from Broward County, Florida, who around December 1980 was working airport surveillance at the Fort Lauderdale airport (R. Vol. VI, pp. 291-293).*
>
> *The Appellant objected to the witness testifying, after hearing the government's proffer, however, the Court overruled the objection and the witness was allowed to take the stand (R. Vol. VI, pp. 286-296).*
>
> *Hernandez testified that on 5 December 1980 he and his partner Ralph Capone were working at the Fort Lauderdale Airport, when they saw two men walk into the airport, each man carrying a suitcase (R. Vol. VI, pp. 291-296). Hernandez testified as to 'eye contact' and the usual 'profile' characteristics.*
>
> *The men went to the ticket counter and after a ticket was purchased by John Slaughter a/k/a John Banks, Appellant Will Brown handed him a suitcase, which Slaughter checked (R. Vol. VI, pp. 296-298). It need be noted the suitcase Brown was carrying had a name tag on it - <u>that of Johnny Banks</u>, the name in which Mr. Banks or Slaughter's airline ticket was also issued (R. Vol. VI, p. 296).*
>
> *After Banks checked the luggage, Brown departed the airport and the police then confronted Banks. As they came downstairs, Hernandez stated they saw Brown by*

the Delta paging counter (R. Vol. VI, pp. 301-303), talking to a ticket agent (R. Vol. VI, p. 304).

The luggage was retrieved, and in Mr. Bank's suitcase that Brown carried into the Airport and handed to Banks, was found fourteen (14) pounds of marijuana, wrapped in a garbage bag (R. Vol. VI, p. 305). In the suitcase Banks carried was found a loaded .38 caliber revolver; on Bank's person was found some seventeen to twenty thousand ($17-20,000) dollars; Banks also had an address book with Brown's name, address, and phone number (R. Vol. VI, pp. 305-506). Both men were arrested for possession of marijuana found in the suitcase. However, Banks plead guilty to the charge, while the State of Florida declined to prosecute Mr. Brown, (R. Vol. VI, pp. 314, 315: compare 309, 310, 312-315 and 318 regarding credibility of the witness) on what Appellant suggests is the obvious, lack of knowledge on the part of Brown. In fact, the best that the 404(b) evidence illustrated is that the Appellant was present at the scene of a crime, and have been unwitting assistant by aiding someone, he knew by carrying his bag into the airport. There was no evidence to even remotely suggest Brown had any knowledge of criminal activity vis a vis Banks, yet alone, that he was part of the same (cf: Redirect and Recross, R. Vol. VI, pp. 316-319)."

The Appeals Court held that it has "long recognized the relevance of previous wrongs and crimes in the context of narcotics violations", and stated it had "little difficulty affirming the exception in the circumstances of the present case" [citations of the Court omitted].

What the Appeals Court upheld is, at best, the showing of propensity to commit crime; indeed the prejudice inherent in this evidence far outweighed any relevance, the effect of which is confemned [See: United States v. Johnson, 254 F.2d 175 (2nd Cir. 1958); United States v. Cox, 487 F.2d 634 (5th Cir. 1973); United States v. Mann, 590 F.2d 361 (1st Cir. 1978); See also: United States v. Powell, 587 F.2d 443 (9th Cir. 1978)]. Too, the Appeals Court decision departs the requirement that "other crime wrongs" be established by "clear and convincing" evidence [See: ie, United States v. Baioleaux, 685 F.2d 1105 (9th Cir. 1982); United States v. Two Eagle, 633 F.2d 93 (8th Cir. 1980); United States v. Herrara Medina, 609 F.2d 376 (9th Cir. 1979)].

To say that the Petitioner was involved in a prior drug scheme on the basis of the evidence offered through Agent Hernandez, could only be predicated upon gross speculation, for surely there was no clear evidence of the same.

The standard applied by the Tenth Circuit to allow this evidence departs all established principles, and review ought be ordered by this Court.

CONCLUSION

On the basis of the foregoing, the Petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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BY: Fred Haddad
FRED HADDAD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Honorable Ted Richardson, Assistant United States Attorney, 4434 United States Courthouse, 200 N.W. 4th Street, Oklahoma City, Oklahoma, 73102, this 8 October 1985.

BY: Fred Haddad
FRED HADDAD

8/20/85

84-2290

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
AUG 2 1 1985
HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	No. 84-2290
	)	
WILLIE DAVIS BROWN, a/k/a WILL BROWN,	)	
	)	
Defendant-Appellant	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CR-84-43-T)

Stephen J. Korotash, Assistant U. S. Attorney, Oklahoma City, Oklahoma (William S. Price, United States Attorney and Ted A. Richardson, Assistant U. S. Attorney, Oklahoma City, Oklahoma, on the brief), for Plaintiff-Appellee

Fred Haddad, Fort Lauderdale, Florida, for Defendant-Appellant

---

Before MOORE, BREITENSTEIN and DOYLE, Circuit Judges

DOYLE, Circuit Judge

APPENDIX A

Defendant-Appellant Willie Davis Brown here appeals from a conviction in the United States District Court for the Western District of Oklahoma. The charge was conspiracy to violate 21 U.S.C. § 841 (a)(1) by possession with intent to distribute marijuana and cocaine. On appeal, defendant contends that:

(1) the district court erred in admitting similar fact evidence of a prior drug arrest under Fed.R.Evid. 404(b);

(2) the prosecutorial misconduct denied him the right to an impartial jury;

(3) the evidence of his participation in the conspiracy was insufficient to support the conviction; and

(4) the government's closing arguments were grounds for a mistrial.

The facts are as follows. The evidence at trial was largely from the testimony of co-conspirators. It established that defendant was the "Florida connection" in a drug distribution operation that transported marijuana from Florida to Oklahoma City, Oklahoma.

On November 24, 1981, police stopped a van and arrested its occupants, Keith Holley, Donald Weber and Terry Holley. They had failed to stop at an agricultural inspection station in the rural Florida countryside. A search of the van by the police produced 170 pounds of marijuana. They found the van to be registered to a co-conspirator, Sam Ponder, who was subsequently arrested. The police then stopped an Oldsmobile automobile that had been following the van. The occupants Greg Holley and Curtis Godwin were arrested after a search disclosed 100 pounds of marijuana.

APPENDIX A

Testimony at trial established that co-conspirators Godwin and Weber had completed a large drug transaction at defendant's home in Florida. Godwin testified that he and Terry Holley bagged 57 pounds of marijuana at defendant's residence.

Further, co-conspirator Michael Mustin testified that he and Terry Holley had purchased 200 pounds of marijuana and half a pound of cocaine for the sum of $100,000 on a previous occasion.

During the trial, the government called Ralph Hernandez, a deputy sheriff from Broward County, Florida. Mr. Hernandez testified that he had arrested defendant on December 5, 1980, for possession of marijuana. The district judge gave the jury a limiting instruction on the use of this testimony as being solely to establish a plan or motive. Fed.R.Evid. 404(b).

Only the defendant and Samuel Ponder were ultimately tried for the drug conspiracy. Ponder was represented by a prominent member of the Oklahoma State Senate who is a black man. Both the defendant and Ponder are also black. During the jury selection stage, the government excused all black venire members through preemptory challenges. Evidence during the second day of jury selection showed that Mr. Ted Richardson, the prosecutor, told the jury clerk that: "We would like to have as few black jurors as possible." The jury clerk told the district judge in chambers that she was not influenced by Richardson's request. The government preemptorily excused all prospective black jurors.

Defendant was convicted by a jury of the conspiracy on June 20, 1984, and was sentenced to five years imprisonment. He filed a motion for judgment of acquittal or alternatively for a new

APPENDIX A

trial. Both of these were denied. We hold that the district court correctly denied these motions and affirm defendant's conviction.

First, we address defendant's contention that the district court erred in admitting the testimony of Deputy Sheriff Hernandez who had arrested the defendant at a Florida airport in 1980. The Deputy Sheriff testified that he observed the defendant hand over a brown suitcase to a Mr. Banks at the airport. The defendant was arrested after the suitcase was found to contain seventeen pounds of marijuana. The defendant asserts that this previous arrest was inconclusive and prejudiced him. We find no merit in this argument. We conclude that the district judge properly allowed evidence of the arrest to be admitted for propensity purposes. Fed.R.Evid. 404(b) explicitly allows "evidence of other crimes, wrongs or acts for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The prior act at issue here was highly probative of defendant's scheme to possess and distribute marijuana. The Tenth Circuit has long recognized the relevance of previous wrongs and crimes in the context of narcotics violations. We have little difficulty affirming this exception in the circumstances of the present case. United States v. Nolan, 551 F.2d 266 (10th Cir.), cert. denied, 434 U.S. 904 (1977); United States v. Leaphant, 513 F.2d 1184 (10th Cir. 1975); United States v. Pennick, 500 F.2d 184 (10th Cir.), cert. denied, 419 U.S. 1051 (1974). The district judge eliminated any prejudice to the defendant by a limiting instruction to the jury that the evidence

APPENDIX A

"was not to be considered as proof of the offense at trial, but for the limited purpose of determining motive, intent, knowledge, absence of mistake."

Second, we consider whether the government's use of preemptory challenges to exclude all potential black jurors, combined with the prosecutor's request to the jury clerk concerning the racial composition of the jury, violated the defendant's right to an impartial jury. Twenty years ago in Swain v. Alabama, 380 U.S. 202,221 (1965), the Supreme Court held that a violation of a defendant's right to equal protection under the Fourteenth Amendment could not be proved by the mere showing that the prosecutor has struck all black venire members from the jury panel in a single case. This Circuit has previously held that the appropriate analysis for a claim that a defendant's right to an impartial jury has been violated is the framework articulated in Swain. United States v. Jenkins, 701 F.2d 850, 860 (10th Cir. 1983). This Circuit therefore requires a showing of "systematic and intentional conduct on the part of the Government calculated to exclude Blacks from juries." Id. In the present case, there has been no showing that the prosecution was responsible for excluding blacks in "case after case." Swain, supra at 223. Because the defendant has not met this threshold requirement, we must conclude that he has no valid claim of an unconstitutional use of the preemptory challenge. Jenkins, supra at 960.

We find no merit in the defendant's argument that communications made by the prosecutor to the jury clerk on the racial composition of the jury indicated a pattern of systematic

APPENDIX A

exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. See McCray v. Abrams, 750 F.2d 1113, 1129 (2nd Cir. 1984), cert. denied, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Since we concluded that actions did not influence selection of the venire members, we must also conclude that the defendant suffered no prejudice because the district judge did not inform him of the incident.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question is one of fact for the jury to decide. United States v. Dickey, 736 F.2d 571, 581 (10th Cir. 1984). See also United States v. Petersen, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905

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(1980); United States v. Watson, 594 F.2d 1330, 1340 (10th Cir.), cert. denied, 444 U.S. 840 (1979). We must review the jury's decision in the light most favorable to the government, United States v. Dickey, supra, at 581; United States v. Pilling, 721 F.2d 286, 288-89 (10th Cir. 1983), to determine whether there was sufficient evidence to establish the defendant's participation in the conspiracy.

Our review of the evidence convinces us that the jury properly found that the defendant participated in the drug conspiracy as "the Florida connection." Trial testimony from Godwin and Webber placed defendant at the house where large drug transactions were completed. The other testimony indicates that co-conspirators Mustin and Terry Holley exchanged money for drugs on another occasion. We must conclude that there is an abundance of warranted conclusion that defendant participated in this conspiracy.

Fourth, we consider whether statements made by the prosecution during closing argument were prejudicial to the defendant. We must conclude that none of the statements constitute grounds for a mistrial. We find no errors in the district court's rulings and affirm on all grounds.

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exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. See McCray v. Abrams, 750 F.2d 1113, 1129 (2nd Cir. 1984), cert. denied, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not immediately inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Later the trial judge explained the matter to the jury and did so thoroughly. Since we conclude that the trial court was conscientious and did not influence selection of the venire members, we must also determine that the defendant suffered no prejudice from this source.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question is one of fact for the jury to decide. United States v. Dickey, 736 F.2d 571, 581 (10th Cir. 1984). See also United States v. Petersen, 611 F.2d 1313, 1327 (10th Cir. 1979), cert. denied, 447 U.S. 905

APPENDIX A

IN THE UNITED STATES COURT OF APPEAL
FOR THE
TENTH CIRCUIT

Case No. 84-2290

UNITED STATES OF AMERICA,)

Plaintiff/Appellee,)

-vs-)

WILLIE DAVIS BROWN, a/k/a WILL BROWN,)

Defendant/Appellant.)

PETITION FOR REHEARING
OR TO CERTIFY CONFLICT

FRED HADDAD, ESQUIRE
429 South Andrews Avenue
Fort Lauderdale, Fl 33301
Telephone: (30) 467-6767

Counsel for Appellant BROWN

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TABLE OF CITATIONS

	PAGE
MCCRAY v. ADAMS, 750 F.2d 1113 (2 Cir. 1984)	1
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UNITED STATES v. JENKINS, 701 F.2d 850 (10 Cir. 1983)	1

APPENDIX B

PETITION FOR REHEARING
OR TO CERTIFY CONFLICT

COMES NOW the Appellant aforesaid by the undersigned counsel and makes this, his Petition for Rehearing in the above captioned matter, and states as follows:

FIRST: That this court has affirmed the rulings of the trial Court and in particular as to the prosecutor's exclusion by premptory challenge of "all black venire members" [opinion page 3].

SECOND: That no mention is made, and perhaps this Court overlooked the fact that during the hearing had by the trial Court regarding the prosecutor's remarks that the prosecutor stated under oath that he took into consideration the fact that the Defendants and counsel for one of the Defendant's was black as a result of a prior trial with the black counsel for the co Defendan, and that was his basis for excluding qualified blacks.

THIRD: That the prosecutor thus detailed his reasons for excluding blacks; which Appellant would urge this Court to consider as obviating the Swain v. Alabama 380 U.S. 202 (1965) requirement of "systematic and intentional conduct" [See also United States v. Jenkins, 701 F.2d 850 (10 Cir 1983)].

FOURTH: That while the court has cited to McCray v. Adams, 750 F.2d 1113 (2 Cir. 1984), the Appellant respectfully suggests that this Court has created irreconcilable conflict with that circuit in its decisions to recede from the strict requirement of Swain, Supra.

FIFTH: That the Appellant would ask this Court to

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reconsider the fact that, as mentioned hereinabove, the prosecutor announced that he excluded premptorily black jurors who stated they could be fair solely on the basis of race, and couple that with the natural inferences of his telephone call to the jury clerk and revisit the opinion authored under the narrow circumstances of this case.

SIXTH: That since the United States Supreme Court denied certiorari in McCray, supra, which Appellant respectfully suggests conflicts with the decision of this Court, the Appellant would respectfully request that this Court certify the opinion herein as conflicting therewith to facilitate review of the Constitutional issues involved in this matter.

WHEREFORE, the Appellant moves that an order be entered setting this matter for rehearing upon the issue raised hereinabove.

SANDSTROM & HADDAD
Attorneys for Appelland Brown
429 South Andrews Avenue
Fort Lauderdale, Fl 33301
Telephone: (305) 467-6767

BY: Fred Haddad
FRED HADDAD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition of Appellant Brown has been furnished by mail to Honorable Ted Richardson, Assistant United States Attorney, 4434 United States Courthouse, 200 N.W. 4th Street, Oklahoma City, Oklahoma, 73102, this 27 August 1985.

APPENDIX B

BY: Fred Haddad
FRED HADDAD

JULY TERM - September 12, 1985

Before Honorable John P. Moore, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 84-2290
	)	
WILLIE DAVIS BROWN, a/k/a WILL BROWN,	)	
	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing or to certifiy conflict filed in the captioned cause.

Upon consideration whereof, appellant's, Willie Davis Brown, petition for reheraing or to certify conflict is denied.

Howard K. Phillips

HOWARD K. PHILLIPS, Clerk

SEP 16 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, -vs- SAMUEL MIRON PONDER, aka SAMMIE M. PONDER, aka SAM PONDER; TERRY WAYNE HOLLEY; GREGORY DUANE HOLLEY; WILLIE DAVIS BROWN, aka WILL BROWN; Defendants.	Case No. Cr. 84-43-T

* *

TRANSCRIPT OF EXCERPTS OF JURY TRIAL HELD BEFORE THE HONORABLE RALPH G. THOMPSON, UNITED STATES DISTRICT JUDGE, ON JUNE 18 & 20, 1984, AT OKLAHOMA CITY, OKLAHOMA.

* *

APPEARANCES

For the Plaintiff:	Mr. Bill Price Mr. Ted Richardson United States Attorney's Office 200 N.W. 4th, Room 4434 Oklahoma City, Oklahoma 73102
For the Defendant, Samuel Miron Ponder:	Mr. E. Melvin Porter Attorney at Law 2116 Northeast 23rd Street Oklahoma City, Oklahoma 73111
For the Defendant, Willie Davis Brown:	Mr. Fred Haddad Attorney at Law 429 South Andrews Avenue Fort Lauderdale, Florida 33301
Reported By:	Theresa A. White, CSR, CP, CM 200 N.W. 4th, Room 3116 Oklahoma City, Oklahoma 73102 405-232-3490

APPENDIX D

(The following proceedings held June 18, 1984)

THE COURT: This is an in-chambers conference. The date is Monday, June 18, 1984. Present are Mrs. Beatrice Ritter, the jury clerk of our Court, in addition to myself and the court reporter. I have asked Mrs. Ritter to speak with me on the record on a matter that she has already reported to me and which needs attention.

It is my desire to handle what I believe is a very sensitive matter in a way that will both preserve certain items of facts, not jeopardize the eventual full exploitation of the facts in its regard, and yet not unnecessarily disrupt a significant narcotics trial now in progress.

The sensitivity of the matter is obvious from a statement that I received from the court clerk, Mr. Frank Domsiero, at the close of business day Friday, June 15th, while our trial was in progress. It was reported to me that Mrs. Ritter had been approached by Tom Richardson, the Assistant United States Attorney who is prosecuting this case, had called Mrs. Ritter during a period of time in which Mrs. Ritter was attempting to furnish us additional jurors so that we could complete the jury selection in the trial. We had exhausted all of our initial jurors, and by agreement of all parties, took a little longer lunch period so that she could acquire about fifteen additional jurors so that we could complete the primary jury and also

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since [illegible] Irvin's.

During the period in which she was engaged in that effort, it was reported to me that Mr. Richardson called her on the telephone, reached her in the clerk's office and asked her not to include any black people in the additional jurors to be furnished.

When Mr. Bonsiero furnished me that information late in the afternoon on Friday, I told him that I would give the matter careful thought over the weekend and proceed today, Monday, as appropriate. Mr. Bonsiero had assured me that Mrs. Richter had assured him that Mr. Richardson's suggestion had not been followed; that no selective effort was made in the procuring of additional jurors on any basis; and that in short, the conversation with Mr. Richardson had not resulted in anything other than the completely routine and proper, regular handling of the jurors from her part or on anybody else's part.

This morning I personally and privately interviewed Mrs. Richter. She stated exactly the same set of facts that Mr. Bonsiero had reported to me, and she assured me that Mr. Richardson's statement to her had not resulted in any effort on her part to honor it or follow it, and that there was in fact no irregularity whatever in the procurement of additional jurors in our trial.

From that assurance and from knowing her and having

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complete confidence in her, I concluded on this date that there was no consequence to this trial, however improvident Mr. Richardson's comment to her might have been.

Having reached that conclusion, I decided that I would wait to advise the parties and counsel about it until after the jury was at least in deliberation and possibly until after they had reached their verdict.

My reason for waiting is my concern that the revelation of what has happened might very well generate substantial publicity, and I am concerned that the jury not be exposed to any unnecessary publicity, particulary of a kind that might very definitely influence them or prejudice them in one way or another in reaching their decisions in this case.

I'm equally concerned, however, that the parties and all counsel in the case have a complete and unimpaired opportunity to explore with all appropriate persons what the facts are in this case in this regard, and I intend to give them that opportunity before the record in this case is closed.

At an appropriate time, when the possible exposure to that type of publicity can be minimized or avoided, I intend to have a full, open, evidentiary hearing with Mr. Bonsiero, Mrs. Ritter, and anyone else appropriate for a full exploration of the facts, present for sworn testimony in open court with all parties and counsel present. It is my belief that handling it in this way, that this highly sensitive and important problem

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can be fully explored without jeopardizing a lengthy and important trial in progress.

I recognize that it is discretionary with the Trial Court as to whether to defer the evidentiary hearing in this regard until a later time or to conduct it by interrupting the course of the trial. I've given this very careful thought and I am completely sensitive to the need for the investigation of the facts and a complete record to be made in its regard; and I have concluded that this is the balanced, fair, preferable method to use.

Having stated that as a preamble, let me proceed now with an on-the-record inquiry of Mrs. Ritter as to all of the facts of this matter as she recalls it.

First of all, you are Beatrice Ritter, our jury clerk.

THE WITNESS: Let me correct you. It's Slater.

THE COURT: I'm sorry. Slater.

THE WITNESS: Use Slater through that. I didn't interrupt you, Judge. That's fine.

THE COURT: How long have you been our jury clerk?

THE WITNESS: About five and a half years.

THE COURT: And you are the person primarily responsible for acquiring an adequate number of jurors and, when necessary, additional jurors so that all of our trials have jurors for our selection process; is that correct?

THE WITNESS: Right. That's --

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THE COURT: And have done that for all the years you've been here in that capacity?

THE WITNESS: That is correct.

THE COURT: Now, you heard me summarize the information that I received, both from Mr. Bonsiero on Friday and from you

THE WITNESS: (Nods yes)

THE COURT: -- this morning, did I not?

THE WITNESS: (Nods yes)

THE COURT: Would you say that I fairly summarized the information both that you gave Mr. Bonsiero and that you gave me this morning?

THE WITNESS: I think you did a very good job.

THE COURT: Now, would you please for the benefit of anyone reading this record, and specifically for parties and counsel involved in this case and for anyone reviewing it at the appellate level, tell me exactly the facts as they occurred and without abbreviating your statement simply because you've already told me this morning.

THE WITNESS: It was around 12:00 Thursday noon when Mrs. Higginbotham told me that you needed additional jurors. I went to the clerk's office to get my assistant to help me call them. While in there, I received this telephone call. He identified himself as Ted Richardson, and as best I remember, he said something about, "Are there any blacks on the jury?"

And it did shock me. I said, "What?"

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He said, "Don't bring any blacks in," something to that effect.

And I said, "I'm going to do the best I can. I haven't even had a chance to get my feet on the ground."

And as I told you this morning, I truly had to take top priority. I had to get the jury in, and I didn't really think too much more about it at that time.

THE COURT: When you say you told him you would do your best, what do you mean by that?

THE WITNESS: I meant that I had to get jurors in, period, regardless of what color they were.

THE COURT: You were not assuring him that you would do your best to exclude blacks, then; is that right?

THE WITNESS: Number one.

THE COURT: Is that right?

THE WITNESS: Right. That's correct.

THE COURT: Your statement, if not explained, could be taken as that.

THE WITNESS: Well, correct. Really and truly, we had only qualified those jurors on Monday before, and I was really not acquainted with the names enough to know whether they were black or white, and I really still am not all of them. But anyway, I just had started calling and Judge Brett had a jury deliberating. There were six women. They came downstairs, and I said, "Go eat lunch and get back. I need you at 2:00."

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THE COURT: Had they reached a decision in that case?

THE WITNESS: They had reached a decision, yes.

THE COURT: And had they been excused?

THE WITNESS: Yes. They had been excused back to me, so I sent them to lunch to be back at 2:00. There was a black in them, a black lady, and I still didn't realize this. I mean, I hadn't had time to think about it; and in calling them in, I just got people that could get in the quickest and the best way we could in the two hours that we had to work with.

There were two additional blacks, so that makes three blacks altogether that was called in. And no, I did not follow his request, order, whatever you might want to call it.

THE COURT: Was anything at all done by you or anyone else involved in this jury process to select additional jurors in this trial on the basis of race?

THE WITNESS: No, sir, there was not.

THE COURT: Was anything done that was not completely regular?

THE WITNESS: I did it the same as I'd always done it.

THE COURT: Is there anything that was done that would cause anyone to question whether there was the slightest effort made to select this jury on the basis of race, sex or any other basis?

THE WITNESS: No, sir.

THE COURT: Was it done?

THE WITNESS: Of course not.

THE COURT: Was it done completely randomly within the available jurors?

THE WITNESS: (Nods yes)

THE COURT: And routinely without any such selection effort made?

THE WITNESS: It absolutely was.

THE COURT: And may I conclude from what you've told me, that not notwithstanding the impropriety of what you were asked to do, that there was in fact no consequence of that sort with regard to the selection of additional jurors from which our jury and alternates were selected.

THE WITNESS: No, there wasn't.

THE COURT: Have we now stated for the record, have you now stated for the record all of the facts bearing on this entire matter?

THE WITNESS: Yes, Your Honor, I'm quite sure there is -- I mean, I have. I -- As I stated, it happened when I was in a hurry and all, but I -- after I got the jury called in and got settled down, as I told Mr. Richardson when he called me, I didn't even have my feet on the ground yet. I mean, the word had just gotten to me; and when I did get my feet on the ground, I began to think about what he had said; and to be quite frank about it, I was in a state of shock.

THE COURT: Did you get the impression from Mr.

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Richardson that he was joking with you or --

THE WITNESS: (Nods no)

THE COURT: -- making some kind of a light-hearted remark or --

THE WITNESS: (Nods no)

THE COURT: -- did you conclude that he called you for the purpose of seriously asking you to do what he asked you to do?

THE WITNESS: I didn't take it as a joke. If he meant it as a joke, in my opinion, it was a poor joke.

THE COURT: Well, it is such an unlikely thing to have happened.

THE WITNESS: That's right. I'll agree with you.

THE COURT: That I have to ask if --

THE WITNESS: This is true.

THE COURT: -- it was done in a jocular vein or if there was anything about the way it was said that would give you any doubts about that, --

THE WITNESS: Well, I certainly --

THE COURT: -- the seriousness in which he asked it.

THE WITNESS: I certainly didn't take it as a joke. I -- after I, as I said, got my feet on the ground and thought about it, I think he was in dead earnest. Maybe I'm mistaken, but I think he was.

THE COURT: Now, one of the reasons that I have hastened

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to have this private, on-the-record interview is so the facts, as you know them, can be as fresh on your mind when it is recorded now as they can be. Because if this case takes another two or three or four days to try, we will be that many more days removed from the event, and that is my intention here is to record the facts as they are best recalled and in as fresh a state as we can get them.

Is there anything else that happened that you can think of?

THE WITNESS: I can't think of anything right now, Judge.

THE COURT: Have we covered the entire subject matter as far as you know?

THE WITNESS: We -- yes, we did. I really will -- can't say word for word; but we did get, you know, the nitty-gritty of the pertinent facts of it. I, as I stated, was in a hurry and had -- because I only had two hours to do this and I knew it was important, and I didn't even realize what had happened until after I got them in and got to thinking about it.

THE COURT: Once you thought about it and became concerned enough to report it to the Court and clerk, did you relate to him the same facts that you've related to me on this record?

THE WITNESS: Yes, sir.

THE COURT: And you heard me summarize at the beginning of our interview what facts he related to me.

THE WITNESS: Yes, sir.

THE COURT: And was that accurate?

THE WITNESS: He -- yes, it was correct.

THE COURT: Thank you.

(Close of requested transcript of June 18, 1984 proceedings)

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(Following proceedings held in Judge Thompson's chambers on June 20, 1984 at 11:05 a.m.)

THE COURT: This is an in-chambers conference with Mr. Richardson. I've asked Mr. Bill Price, the U. S. Attorney, to join him and us, and Mr. Porter and Mr. Haddad for the purpose of my sharing with them some information that I have received during the course of this trial. It is also for the purpose of my sharing with them the initial step that I took in regard to the information that I've received, and for the further purpose of offering to conduct an evidentiary hearing as may be requested by either or both of the defendants or perhaps the government in regard to what I'm about to tell you.

You will recall that in the selection of the jury, we ran out of jurors in our first group; and for the purpose of completing the jury, both primary and alternate, we took an extended noon recess and requested the jury clerk to provide additional jurors for that purpose, and she did that.

It was reported to me that during her efforts, during the noon recess, that Mr. Richardson telephoned Mrs. Bea Slater, our jury clerk, and requested that she not include any blacks in the additional number of jurors being arranged for. Mrs. Slater reported that to the court clerk, Frank Bonsiero, who in turn reported it to me, and this occurred late Monday evening. I'm sorry. Late Friday evening after the trial had recessed.

On Monday, I asked Mrs. Slater to come to my office, and

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I privately inquired of her about the information that I had received from Mr. Bonsiero. I made that inquiry in her presence, in the presence of the court reporter only, to determine what she had to reveal and to determine what steps I should take and when I should take them.

Mrs. Slater reported to me that during the noon recess when she was busy trying to arrange for some fifteen additional jurors at my request, that she had received a telephone call from Mr. Richardson, receiving the call in the court clerk's office, and that Mr. Richardson had indeed said, in effect, "Do not include any blacks in these additional jurors that you're arranging for."

I asked Mrs. Slater if she did anything to honor his request or to give it effect, and she assured me that she did not, that she arranged for fifteen additional jurors without regard to any racial or other basis; and in fact, I believe three of the fifteen or one-fifth of them were in fact black.

In any event, she assured me that nothing in the jury selection process was altered by the reason of the request that she said she received from Mr. Richardson; and I recall that we did have black people among those additional jurors; and concluded, therefore, that while there was a serious allegation of prosecutorial misconduct, that it had had no consequence as far as this case is concerned, and that the selection of the jury for this trial had not been affected at all by reason of

what Mr. Richardson had reportedly asked of Mrs. Slater.

In that belief and based on those indications, I elected not to disrupt the trial by acting on the problem during the course of it, mainly because I did not want any publicity surrounding this information to possibly contaminate our jurors; and I believed, because it had apparently had no consequence to our trial, that my revelation to you gentlemen and any hearing in its regard could wait until the jury was in deliberations and therefore not as exposed to any publicity that this might generate as they would at any other earlier time.

My concern is great. I want Mr. Richardson to have an opportunity to respond to the information that I have just shared with you, and I want the defendants, through their counsel, to have the opportunity, as well as Mr. Richardson, to have the opportunity of inquiring of Mrs. Slater and satisfying themselves on the matter, and I make that opportunity available to both sides.

Mrs. Slater is here, she's standing by and we can do that at any convenient time. I would suggest that if we are to have further inquiry or an evidentiary hearing, that it should be done as promptly as possible before a verdict is reached, and I certainly want both sides to have an opportunity to be heard in this regard. But obviously it's a matter of great concern to all of us, and I conclude my remarks to you this way. You know

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all that I know now. Mrs. Slater is available and we'll proceed as appropriate and as requested. And I do not require Mr. Richardson to make any comment at all now unless he wants to.

MR. RICHARDSON: I do.

THE COURT: But I also want to be very clear in that I do not suggest or propose that this matter be conducted in its entirety behind closed doors in chambers. This is a highly sensitive matter. Counsel may feel that they should inquire of Mrs. Slater in regard to its possible effect on their case; and if that's requested, it should be done in open court with the defendants present so they can satisfy themselves in that regard. And I'll proceed as you gentlemen request.

MR. HADDAD: Because of challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both peremptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause, I particularly would request an evidentiary hearing, and I don't mean that to be -- but I think for the preservation of the record, particularly with this occurring, which to me is somewhat overt racism in a selection of a jury with black defendants. And I think when one considers -- I don't know how to -- let me just review my notes, but there are some things that caused concern considered during the course of this trial that, all taken

together, I think we need an evidentiary earing because some due process rights may have been violated.

THE COURT: Mr. Porter?

MR. PORTER: Well, I wasn't convinced in my own mind that an evidentiary hearing was going to be necessary; but in light of what Fred has said, I would like an opportunity to confer with him and so we might be able to at least be together on whatever is to take place.

THE COURT: All right.

MR. HADDAD: I didn't mean to speak for you. That was my initial thought. I haven't had time to reflect on it even.

MR. PORTER: I understood that.

THE COURT: I think that before anyone makes a decision on anything that we should take a little recess and let all of you confer as you see fit.

MR. PORTER: Right.

THE COURT: Did you want to say something, Mr. Price?

MR. PRICE: Well, essentially I wanted to have Ted have an opportunity here first to respond because I think you all may decide, you know -- And again, I don't know what the response is or whatever, but having a hearing in open court on something like this may be justified or it may be something that besmirches his reputation, too, and you all may, after hearing the explanation, decide that that is not something that should be done; and so what I'm suggesting is that I think that

we first should hear the explanation, and then you all making a decision in your own heart whether this is something that should be the subject of an evidentiary hearing.

MR. PORTER: All right.

THE COURT: Let me ask everyone this first of all, or state for the record, and for your benefit: I have not revealed this with any of you. You will acknowledge that, will you not all?

MR. PROTER: Yes, sir.

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

MR. PRICE: Yes, sir.

THE COURT: So that everyone comes to this moment on an equal basis as far as any information is concerned.

MR. PRICE: Absolutely.

THE COURT: Would you prefer to talk with Mr. Price before commenting, Mr. Richardson?

MR. RICHARDSON: No, sir. I would like to be sworn in, and I don't need to confer with anybody about what I want to tell the Court, and I think what I have to say, we need to be on the record; and then Mr. Porter and Mr. Haddad can make their decision from there.

TED RICHARDSON

being first duly sworn, testified as follows:

THE COURT: Mr. Porter and Mr. Haddad, are you agreeable

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to inquiring at least initially without the presence of your clients?

MR. PORTER: Yes, sir.

THE COURT: Under these circumstances?

MR. RICHARDSON: Yes, Your Honor. I can tell you specifically, I did call Mrs. Slater. I recall at the time it was, I guess on Thursday when we were selecting the jury panel and when we had run out of jurors. There was some kind of break maybe for lunch or something like that, and some more were called in.

I called her and I specifically asked her if she knew how many blacks or anything like that, if there were any way to tell how many black people were going to be called into the subsequent number of jurors, and she said, I believe, that she didn't know; and I specifically wanted to know because that affected what the composition of the jury panel was.

I never asked Mrs. Slater not to call any black jurors. I just simply wanted to know how many, if she could tell, were in the group that were coming in.

During the voir dire or the selection process of the jury, there were some black jurors. Several were excused, as I recall, by the Court. I excused one during the regular group that we were selecting, and then in the subsequent group, I selected another. It wasn't racist on my part to excuse those particular jurors; but I think, in all candidness, I've tried

cases with Mr. Porter before, and I think he's a marvelous opponent. He's very good in everything, and he also has a very special appeal to the black people in the community.

And the one trial that I can think that we had together that actually went to trial, Judge Smith got kind of worn out with Mr. Porter and myself and said, "Men, I'm worn out with you two. I want you to take the first twelve jurors and not excuse anybody," which we did. There were six black and six white jurors on that case. It was a robbery, and it appeared to me an open and shut case. The man was caught there with the purse and the money and everything. We had a hung jury in the case, six to six, along the racial lines.

And so all I'm telling the Court is that I did take into consideration the fact that these people were black and that almost everybody -- I would think they would be an incompetent juror, almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was.

And my request of Mrs. Slater was not in any way to get her not to call any jurors or to pick and choose among the people that, say, the government would want; but I did want to know if possible in advance who would be the -- not their names, but if there was any way to know how many black jurors would be coming in the additional group because I knew at least

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one or two of them would be on the jury panel itself, and I don't know what else to say about that.

I would be glad to answer any questions that the Court has or that Mr. Haddad or Mr. Porter or -- I thought that was Bea back there -- that anybody would have.

THE COURT: Mr. Richardson, are you able to recall with specificity what you said to Mrs. Slater in that conversation?

MR. RICHARDSON: I can't repeat it verbatim, Your Honor, but I specifically remember the conversation, and you know, I thought at the time, well, maybe I shouldn't call and even inquire; and I do specifically remember the conversation and everything that was said, yes, sir.

THE COURT: Are you sure, then, that you did not ask her to select the new group of jurors on any racial basis?

MR. RICHARDSON: I'm positive I did not ask her to select or choose anybody on any basis, but I did specifically ask her if she could say, you know, if these were black or white people, yes, sir.

THE COURT: Mr. Price, do you have any inquiry of Mr. Richardson?

MR. PRICE: There wasn't any kind of even a kidding reference in any way to -- Obviously you don't have any influence over a court clerk, an Assistant U. S. Attorney doesn't, any ability to get them to do anything you want them to do. Is there any possibility that you made any kidding

reference to that that she could have misinterpreted?

MR. RICHARDSON: I think that the attorneys would just have to ask Mrs. Slater. I don't think so. I -- I may have said something along the lines I would sure like to know how many blacks are coming because I, you know, know simply that Senator Porter has a big influence on the black population. But in reference to anything to indicate don't call blacks or pick and choose among them or something like that or even kidding about that, there wasn't any.

MR. PRICE: Did she express to you any concern about this conversation? Did she say that what you're doing --

MR. RICHARDSON: No, she didn't.

THE COURT: You're telling me to do something I shouldn't do or something like that?

MR. RICHARDSON: No. She just said, "Ted, this is who we're calling from and I'm trying to get the people in right now."

MR. PRICE: And it was just a few second conversation or was there anything beyond that that you recall?

MR. RICHARDSON: You'd just have to ask Mrs. Slater, really, about that. I don't think it was more than maybe, maybe two minutes. I don't know. It was a very brief conversation. That's all I know.

THE COURT: What was your purpose in asking for a numerical breakdown of blacks versus others in the additional

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jurors to be called?

MR. RICHARDSON: Well, I didn't really ask for a numerical rating. I just asked her if there was any way she could tell whether or not the people she was calling were black or white. And my purpose, I think, was like I just said, was to see, you know, if there were going to be either a lot or any or none at all of black people.

THE COURT: Yes.

MR. HADDAD: You're an officer of this Court; there is no question about that.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And your job as prosecutor is to provide defendants a fair trial; not only get a conviction. Do you agree with that?

MR. RICHARDSON: Sure.

MR. HADDAD: And would you agree you were out of peremptory challenges at the time the new panel was called, as were the defendants?

MR. RICHARDSON: We would have to check the record on that.

MR. HADDAD: Or you had one left.

MR. RICHARDSON: I was under the impression I had one left, but I'm not positive on that.

MR. HADDAD: You may have been out or had one challenge left.

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MR. RICHARDSON: Yes, sir.

MR. HADDAD: And of the three black called, my recollection there were three; two were excused by the Court. Would that be fair, for cause, in the initial panel? Two were excused by the Court for cause; would that be correct?

MR. RICHARDSON: I don't know. I know that I excused one on my peremptories, and there were no other black people on the panel.

MR. HADDAD: Would you agree that after the rather extensive voir dire that the Judge conducted on all jurors, that that black juror that you exercised your peremptory challenge on had stated that she could be fair, she would not be influenced by the fact of Senator Porter and so forth?

MR. RICHARDSON: Yes, sir, that's correct.

MR. HADDAD: Okay. And would it be a fair statement and it may be that this question is so basic as to sound absurd, if you were out of -- if you had one challenge left and a black were called and you exercised that challenge peremptorily and another black were called, you would be out of challenges.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And you would admit, would you not, that the evidence that at least perhaps not coming out at trial but through the discovery was such that these black defendants were selling dope to white people, according to Mustin. Mr. Ponder would sell his dope mainly to white people.

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MR. RICHARDSON: No, I don't think that was the evidence at all.

MR. HADDAD: I said not what came out in trial. Would you agree that the statements of Mr. Mustin in this trial pursuant to discovery furnished by you as a result of the investigation conducted by Agent Linas -- I can't say his last name -- was such that the evidence would have been, had that testimony came out, that pursuant to those statements that Mr. Mustin made, Mr. Porter was selling his dope mainly to white people and keeping a large percentage of profits.

MR. PORTER: Ponder.

MR. HADDAD: Ponder, I'm sorry. Would you agree that those statements were made and that was in the discovery?

MR. RICHARDSON: How embarrassing. I haven't even reviewed those statements that Mustin made to the FBI. I do know that there was some statement somewhere that Mike Mustin said Sam Ponder sold his drugs to white people.

MR. HADDAD: And also Gregory Holley?

MR. RICHARDSON: If you say so, I assume that's correct.

MR. HADDAD: Okay.

MR. RICHARDSON: Can I -- Oh. I just want to say one other thing before I forget it, if I can. I want the record to be perfectly clear that I have no objection whatsoever to black people being on this trial or any other trial, and I think the record is very clear that I do not excuse many black people

ever. I like to excuse them when Senator Porter is the opposing attorney.

MR. HADDAD: So you would agree, then, pursuant to your statements, that because of a trial experience you had, you feel a black lawyer of Mr. Porter's stature representing black defendants denies you what you think is a fair trial?

MR. RICHARDSON: I just think that Senator Porter has a very, very influential effect on jurors that are black.

MR. HADDAD: Do you want me to have the question read back?

MR. RICHARDSON: What was your question?

MR. HADDAD: Could you read it back, please?

(Reporter read pending question)

MR. RICHARDSON: That's hard to answer. I just can't answer it yes or no.

MR. PRICE: I would imagine that Senator Porter, when he is trying cases in Muskogee, Oklahoma against Gene Stipe would tend to dismiss people from McAlester. Let me just give that analogy to you. I imagine if you were trying a civil case in Muskogee, Oklahoma, and Senator Gene Stipe has such a tremendous reputation and consideration in places like McAlester, Oklahoma, you'd have a tendency to dismiss people that from McAlester area that came up in a Muskogee Federal Court jury.

What I'm saying is, that let's face it, you may not be

talking about race here. You may be talking about you're a state senator that represents basically the entire black community of Oklahoma City, highly respected, highly well-thought-of, and have probably about ninety-eight percent name recognition and probably about something similar to that in terms of the respect of that whole area of Oklahoma City.

I just think in fairness to Ted Richardson, that think of that thought would come to your mind. I imagine that that would be something that would be going through your mind if you were trying a case in places like Muskogee in the same way.

MR. PORTER: Well, the only thing, that I've tried many jury cases, both civil and criminal, where black citizens even from Oklahoma City have been on the jury and I have not -- I wish that -- I wish that that were always true. I've probably lost as many with black citizens on the jury that I've won.

It's a very difficult thing, you know. I'm not a ninety-eight percent hero, particularly in the minds of some blacks; and I suspect that's obvious by the mere fact that in the twenty-one years I've been in the senate, I have had opposition from the black community every time but one, so I'm certainly not politically that much of a hero.

Again, before I take any position on this -- And I understand Ted's right and I think he has a very fundamental right to respond to it if he wanted to prior to any fixed opinions being developed. Again, seeing that it's been laid

out, he's responded, and I would certainly like to have an opportunity to I guess confer with co-counsel and see how it would be best to approach this matter. I for one --

MR. HADDAD: I have one last question, but I guess --

THE COURT: Let's let Mr. Porter finish.

MR. HADDAD: Okay.

MR. PORTER: It is a delicate matter, and it's just something that I suspect that I would want a little time to visit with Fred on to see if we could not at least be in agreement on whatever was going to take place.

MR. HADDAD: I hadn't finished. I had one more question when Bill interrupted me.

MR. PRICE: I'm sorry.

MR. HADDAD: That's okay. Would you agree that had either myself or Mr. Porter went to the jury clerk and requested, if that be what happened, that all black people be called, that that would be a commission of attempted obstruction of justice?

MR. RICHARDSON: I would think it would be very improper.

MR. HADDAD: Would you agree it would be attempted obstruction of justice by invading the jury process or attempting to so do?

MR. RICHARDSON: I hate to sound so ignorant. I don't know exactly what it would be.

MR. HADDAD: Okay.

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MR. RICHARDSON: I just think it would be very improper if you all asked Bea only to call black jurors.

MR. HADDAD: Okay.

THE COURT: Let me suggest, before we take a break and let everyone confer, that the alternatives as I see it are as follows. Number one, Mrs. Bea Slater, the jury clerk, is available for inquiry in chambers or otherwise in an evidentiary hearing in the courtroom, and she will remain available to us and we'll proceed as appropriate after you've conferred.

The inquiry that I made of Bea Slater on Monday was on the record. The time has not permitted a transcript to be typed of that, but I will be glad to share and I have attempted to share with you what she told me. And I will tell you further that, and you will see this when you see the transcript of what her answers were, that she felt rushed, as she certainly should have because she was asked to get fifteen additional jurors very quickly so she didn't delay our trial. That her memory was not specific as to the words said, and in fact she did not promptly report it to the court clerk and did so only upon reflection in feeling that it was something, upon reflection, that she should report. So the words as related to me by Mrs. Slater and the account of the conversation by Mr. Richardson are inconsistent, and I suggest that Mrs. Slater should be inquired of for your satisfaction, but we can do that

in any form that you feel is appropriate.

But why don't we take a few minutes and let all of you confer, and then I'm available to you when you're ready to reconvene.

(Following proceedings held in Judge Thompson's chambers at 12:15 p.m on June 20, 1984)

THE COURT: After having the opportunity to confer, defense counsel now have suggested and it is agreeable with everyone that the court reporter will read to all counsel the record of the inquiry that I made of Mrs. Bea Slater on Monday of this week, and all are further in agreement that my presence is not necessary for that to be done, and then we'll reconvene and proceed after they have had the benefit of hearing that record.

MR. HADDAD: The Court's going to lunch; right?

THE COURT: Yes. Now.

MR. HADDAD: Okay. I was going to say you said to reconvene about 1:30. Maybe I'll grab a sandwich, too, and make some phone calls.

THE COURT: Do you want to have it read to you now?

MR. HADDAD: Yeah, but I'm saying you said we would reconvene and it was at 1:30.

THE COURT: Yes. 1:30 is agreeable to me if it's agreeable to you.

(Court reporter read entire in-chambers conference which

was held on Monday, June 20, 1984)

(Following proceedings held in Judge Thompson's chambers at 1:30 p.m. on June 19, 1984)

THE COURT: Gentlemen, you have now had read back to you my inquiry of Mrs. Bea Slater that I conducted on Monday, have you not?

MR. PORTER: Yes, sir.

MR. HADDAD: Yes.

MR. PRICE: Yes.

THE COURT: You've also had the opportunity to consult among yourselves and with each other.

MR. PORTER: Yes, sir.

MR. HADDAD: I think we need a hearing.

MR. PRICE: Let me inquire. Can we have the hearing initially here in chambers?

MR. HADDAD: Yes, sir.

MR. PRICE: With Bea Slater?

THE COURT: With Ms. Slater.

MR. HADDAD: Yes. And Mr. Bonsiero.

THE COURT: Bonsiero is the court clerk, whose role in this, I might add, was to report to me what his subordinate Mrs. Slater had reported to him.

MR. HADDAD: Uh-huh.

THE COURT: And they are both available, and we can take them in any order of your choosing.

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MR. PRICE: I don't know.

MR. HADDAD: Take the gentleman first, I guess, and the lady second.

MR. PRICE: Of course, really what he's just saying is the hearsay recitation.

MR. HADDAD: It's only a hearing. Hearsay can come in. I'd like to have him here.

THE COURT: Is that agreeable? I'll call for him first.

MR. PRICE: That's fine.

THE COURT: And then we'll have her come down.

MR. HADDAD: My clients would like to attend, if that's all right with the Court.

THE COURT: I'm not going to exclude them, but I suggest we relocate in the library.

MR. HADDAD: Okay.

THE COURT: And of course, that means we'll have to have the marshals present as well, so we'll make those arrangements.

(Following proceedings held in Judge Thompson's library at 2:00 p.m. on June 19, 1984)

THE COURT: We are meeting in chambers with both defendants personally present, with each of their counsel, with Mr. Richardson and Mr. Price, and with the deputies assigned to the trial, together with myself and the court reporter. And we are meeting for the purpose of making Mr. Bonsiero available to answer any questions regarding what he knows about the issue in

question.

And I might, as a starting point, recite that after the trial had recessed for the weekend on last Friday afternoon, Mr. Bonsiero asked to see me, came to my office and related to me information given him by Mrs. Bea Slater, the jury clerk. And Mr. Bonsiero's information to me, I have already given on the record here, so I won't burden the record by further describing it, particularly since he's here to give that answer personally.

But as an opening inquiry, did you come to my office about 5:00 after the trial had recessed last Friday, upon receipt of Mrs. Slater's report to you that she had received a call from Mr. Richardson, and is that not so?

MR. BONSIERO: Yes, sir, it's true.

THE COURT: Now, for the benefit of everyone here and for the benefit of the record, would you as closely as you can recall it, state all the facts, starting with your first contact from Mrs. Slater and then through the conclusion of our conversation.

MR. HADDAD: Excuse me, Your Honor. I don't know, but for purposes of the record, does he need to be under oath?

THE COURT: I think it perhaps would be better. So would you raise your right hand and be sworn.

MR. HADDAD: Thank you, Your Honor.

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being first duly sworn, was examined and testified as follows:

THE WITNESS: At about as near as I can recall, about 4:00 on Friday afternoon, Bea Slater came into my office, my jury clerk, and she was obviously distraught, and she said, "I have something to tell you."

I said, "Well, by all means, please do."

And she said, "You know about the Thompson trial that they are having down there today."

And I said, "Yeah. I know of it."

She said, "Well, we tried to get a jury yesterday." I think she said that we sent down, originally sent down thirty jurors and they couldn't get a jury panel -- or couldn't get the twelve and the alternates selected.

"So I was under orders from Irene, who is under orders from Judge Thompson to get -- call in additional juries -- jurors."

And this was some time around, oh, I would say, 11:45 on Thursday that she got notification that she would need more jurors. So she was scrambling like the dickens to get the additional jurors, and about noon she told me she got a call. This is Thursday still. At noon she got a call from a person who identified himself as Ted Richardson, and she said that Ted said, "Bea" -- Let me recall this now. Said, "Bea, uh, we'd like not" -- words to the effect that, "Uh, we'd like to have as few blacks as possible on this jury."

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And Bea made the statement that, "Ted, I'm just scrambling like hell to get what I can, and I just have to get however many jurors however possible I can get them," as if to -- you know, not to give any -- the statement not accommodating the request.

So I asked Bea, I said, "Now, Bea, that could be, you know, there could be some difficulty in his request." I said, "Are you sure that's what he asked?"

And she said, "Yeah. He said he would like to have -- not for us not to get any blacks."

And I said, "Well," again she asked me, displaying her anxiety over this. "Do you think we have to do anything about this?"

And I said, "You're damn right." I said, "We can't sit on this. This thing may be bigger than both of us. I'm going to have to go to the Trial Judge on this." Or I may have said, "I'm going to have to go to the Chief Judge," but I had second thoughts on that and I said, "I'm going to have to go to the Trial Judge on this."

And again, this was around 4:00 in the afternoon and I came down here immediately with the intent of seeing you, but I knew that you were in Court; and therefore, I left word with Sharon and said, "I absolutely have to see Judge Thompson before he leaves today."

At 5:00 you called me or she called me, and I related the

story to you in chambers.

THE COURT: Okay. Who wants to make first inquiry?

MR. PRICE: Why don't you all.

MR. HADDAD: Okay.

DIRECT EXAMINATION

BY MR. HADDAD:

Q Did Mrs. Slater appear that she could have been misinterpreting what Mr. Richardson had said?

A I asked her a couple different times, "Now, are you sure this is what he said?"

She said, "Frank, you know, I was in -- running around just trying to get as many jurors as possible, but I'm -- I feel certain that that was the request, that, you know, he had asked to -- not to get any blacks on the jury."

Q All right. And to your knowledge, has a U. S. Attorney or an Assistant U. S. Attorney ever called your office in any regard relative to the makeup or composure of prospective juror panels?

A That's the first time that that came to my attention, anything that type -- that type of incident.

Q And how long have you been the clerk?

A I have been acting clerk -- I've been clerk since May and acting clerk since November of last year.

Q Okay. Now, did you inquire of Mrs. Slater why she waited a day to tell you?

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A I was a little bit concerned about that, yes. She was -- she really didn't know. I suppose she had a tiger by the tail and she didn't know what to do with it. As a matter of fact, she went home that evening, and she related this story to me, and her husband said, "Now, look. You have to tell your boss, and if you don't tell him, I will."

And you know, so she did come to me the next day. But she just -- I think she wanted to, which I would suspect would be anyone's natural, their first response to it is perhaps to avoid a somewhat thorny problem.

Q So that --

A Now, I'm just -- This is me talking. This isn't her.

Q I understand that. I'm not trying to put words in your mouth at all.

A Okay.

Q What I'm trying to get is she related to you that she was in essence troubled by this and related what happened with her husband.

A Well, she related the incident to her husband, and her husband said, "Now, look." You know, he saw perhaps the seriousness of it all, and he said, "You're going to have to go tell your boss," so --

Q So that at least at any rate, your way of thinking, she knew what she had heard in her own mind.

A Oh, yes.

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Q Or else she wouldn't have related it.

A Oh, yeah, there is no question about it. No question about it.

MR. HADDAD: I have nothing else.

THE COURT: Mr. Porter?

MR. PRICE: Frank, let me.

THE COURT: Mr. Porter, did you wish --

MR. PORTER: No, sir.

THE COURT: Go ahead, Mr. Price.

MR. PRICE: I'm sorry.

CROSS-EXAMINATION

BY MR. PRICE:

Q At the time she talked to you was what time the next day?

A I'm going to have to say it was somewhere around -- between 3:30 and 4:00.

Q Of the day after the incident?

A Yes. She came and sought me out on Friday afternoon, 3:30 or 4:00.

Q You relate basically that she said to you, "We would like as few blacks as possible on the jury panel."

A I'm paraphrasing the --

Q That's what it sounded like she was saying that Ted Richardson said to her; is that correct? Is that your understanding?

A I think. I -- I think -- Yes, and I think the more

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accurate quote was, "Don't get any blacks on the jury," or, "Don't get any black jurors."

Q The way you first related it was, you know, "We would like as few blacks as possible on the jury panel," and I, at least in listening to you, I was interpreting you saying that that's what Ted Richardson told to her and she interpreted that as meaning, and it would be very interpretable as meaning, "Don't put any blacks on the jury."

A All right.

Q Could it have been either way, the way it was related to you, could it have been that she was saying to you that, "Ted Richardson said we would like as few blacks as possible on the jury panel, and I feel he's asking me not to put blacks on the jury panel." Is that certainly consistent with what you heard?

A Yeah.

Q Or it could be either way?

A But she has told me since that time, when we've talked about it -- Okay, she and I have talked about it, that the question or the statement was, "Don't get any blacks on the jury."

Q Okay.

A That was -- that was the one thing that I picked up on. That was the one statement.

Q Did you ask her, did you quiz her about this? In other words, did this affect her at all in the way she carried

herself out in doing the jury?

A Absolutely not. As a matter of fact, as a matter of actual fact, I think the -- after the lunch break, when they went back into Judge Thompson's court, I think of the -- however many jurors there were, there was at least one black there.

Q The U.S. Attorney's office has no ability to order anybody to do anything like you're talking about. I mean, we've never tried to do that.

A I'm --

Q And we would have no -- we have no --

A I'm certainly aware of that. I don't dispute that.

Q Again, we'll have to ask her whether it could have been misinterpreted. This was a phone call, as you understood it.

A It was a phone call, and in fact I wasn't there, but the phone right outside of my office where my secretary sits, and around that time, if I can recollect what Bea said to me, she said everything -- she was, as I said, scrambling to get juries jurors, and people were at the counter; and she took this phone call right at that desk.

Q Did you ask whether she questioned him about, you know, "What are you talking about," or, "What are you asking me to do," to make sure -- you know, "I can't do that," or anything like that? Did you --

A She said -- her response to that was, and now at what

particular time it was, I don't remember. But her response to the entire statement was, "I'm just getting my feet on the ground, Ted, and I've got to get the jurors from wherever I can." Again, paraphrasing but that's --

Q It wasn't any response like, "You're asking me to do something improper," or anything like that that would normally alert someone that was the --

A To my knowledge, no, there was no response like that that she gave.

MR. PRICE: Ted?

MR. RICHARDSON: No.

MR. HADDAD: May I ask one more question?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. HADDAD:

Q Sir, I don't know how it works here. Would it be fair to say that Mrs. Slater, the deputy clerk, selects the jurors, who would be called in, by looking at her cards or getting cards and calling certain people?

A She does -- She's given an order by the -- well, let me say this. She consults with the courtroom deputy. In this case the courtroom deputy for Judge Thompson. She'll consult with any courtroom deputy, and the most pressing question is how many jurors do we need? Okay. And she'll call them in, irrespective of whatever.

Q I understand that. But what I'm asking you is if one were -- And I'm not suggesting in the slightest that your clerk's office would ever do that, if one desired to exclude blacks from a potential panel of jurors, they could do that, could they not? Let's say that you were given an order to call in, out of the forty or fifty cards, you had to call on ten jurors, you could assure it would be a white jury, could you not?

A I suppose you could, only if you knew. We qualify a jury twelve times a year, once a month, okay? And if you knew of that -- of the racial makeup on that very first day, you could; but without that information, you couldn't. It would be impossible.

RECROSS-EXAMINATION

BY MR. PRICE:

Q In the position she was in, Frank, at this time, it would be totally impossible for her to really know that. You would not be able to remit -- you know, if she was being called to do this, how would she know at that point? All she would have is all the names of the people to be called. Is that basically where she would be at at that time?

A Although she would have the advantages I described here, she might know, being familiar and working with the jurors in this case if they were empaneled -- I think they were empaneled on last Monday. She might know, you know, who is black and who

is white.

Q Conceiveably?

A Conceivuably, yes. Yes.

Q But let me ask additionally. They just call the entire, as I understand it, when they get a call to call the number of jurors, what's the procedure? Is it just called at random? You pick out the jurors to come up next at random or how do they do that? I'm sorry. I still don't quite understand you.

A Well, what they will do is she'll try not to call a juror who -- obviously, she can't call a juror who is at that time sitting on a trial. And she'll try and make every attempt, at least this is my understanding, she'll make every attempt to call jurors who have not sat on a trial yet.

Q So she just sits down and calls as many of the jurors that have not been called upon the previous time?

A Under normal circumstances, when she has enough time. However, in a case like this, and this is not a very atypical case. It happens occasionally. She'll get requests like this where she only has an hour or two to get people in here. Part of the makeup of the second jury that was called in, six of them were coming down off of the elevator. They had just been released by I believe Judge Brett or Judge West. I think it was Judge Brett. Had just been released by Judge Brett, so she got those six and I think she needed fifteen. So subsequently she would have had to have called in nine more.

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Q You're talking about the jury clerk also would have to remember the names, much less the racial background of literally how many people? Maybe sixty or a hundred people?

A Exactly, yes. It would be a hard chore. There is no question about it.

Q It would be close to an impossibility?

A It certainly would.

Q So what was alleged to have been requested would have been, like I said, close to an impossibility. It would require a photographic memory and someone that had that kind of recollection of a huge number of people that that are coming in all the time.

A Conceiveably, yes. Yes.

MR. PORTER: I have one question.

REDIRECT EXAMINATION

BY MR. PORTER:

Q Let's say that she had to call in fifteen additional jurors and let's say that if she had to call those jurors and they were not in the building, then I take it that she has a phone and an address of each juror; is that right?

A Yes, sir.

Q And so if a juror lived in the northeast section of Oklahoma City, say a typical address, 2116 Northeast 18th, one could very easily say in all probability that is a black citizen if that is the northeast quadrant where the greater

segment of the black population lives. That could be a possibility; is that not right?

A I suppose if a person is aware of the makeup.

Q Of the geographical --

A Yes.

Q And if one was conscientious about names that are common to blacks as opposed to other ethnic groups, to some extent, that would be a possibility that I can identify a person by name.

A I agree, but here again, you're talking about a jury clerk that's just --

Q Yes.

A Just concerned about meeting the demands of the Judge.

Q I understand. What I'm saying, let's say if she had honored his request and said, "I'm going to try to eliminate any blacks," then that would have been a possibility of eliminating somebody who might have been black, at least by name or by geographical area where they live.

A I suppose that -- It could be.

MR. HADDAD: Can I follow that up?

REDIRECT EXAMINATION

BY MR. HADDAD:

Q And also, certain people, i.e., coming off of the other judge's trial, she could have kept those that were white and sent home those that were black.

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A (Nods yes)

Q I mean, yes or no?

A Yes.

Q Okay.

A Yes.

THE COURT: Now, Mr. Bonsiero, if there are no other questions, let me conclude with these questions of you.

Was there anything at all said to you by Mrs. Slater or coming to your knowledge otherwise that suggests that there was any effort intended or made to select those additional jurors on the basis of race or otherwise?

THE WITNESS: No, sir. I'm personally convinced that she got those jurors in here without any thought to that, Your Honor. That she just got them in, whomever she could get in here without --

THE COURT: We have two areas of concern here. One is the possibility of an improper contact by an Assistant U. S. Attorney with the jury clerk in its own right. Another question and concern is whether that contact had any effect or had any consequence on the makeup of the jury in this trial.

THE WITNESS: (Nods yes)

THE COURT: On the basis of my conversation with you on Friday and my conversation with Mrs. Slater on the following Monday, I concluded that all indications were that while an improvident contact may have been made and certainly required

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investigation, that there was no indication that that request had any effect whatever on the makeup of the jury in this trial. Am I correct in that?

THE WITNESS: Yes, sir.

THE COURT: Any other questions?

MR. PORTER: Yes. Judge for the record, I think you're absolutely correct because as I remember there were approximately 125 jurors; and of that makeup, I distinctly remember not one but three of those jurors being black.

THE COURT: Yes. I recall it that way, also.

MR. PORTER: Yes, sir.

THE COURT: All right. Thank you very much, and would you ask Mrs. Slater to come down to the hearing.

THE WITNESS: Yes, sir.

THE COURT: Just keep your seats.

(Recess held)

THE COURT: Gentlemen, this is Mrs. Beatrice Slater, our jury clerk. Mrs. Slater, would you stand, raise your right hand and be sworn.

I think the record is complete enough at this point that any preamble or preliminary comments are unnecessary, except to explain to you, Mrs. Slater, that we are all interested and concerned about the information that you related to Mr. Bonsiero initially and then at my request related to me regarding a telephone call from Mr. Richardson. The purpose of

this hearing is for all parties and their counsel to have an opportunity to inquire of you about that. And I think that's enough said, and I'll invite counsel to inquire.

BEATRICE SLATER

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HADDAD:

Q We have had the benefit of hearing Ms. White read back your testimony that was recorded before the Honorable Judge Thompson, and let me ask you this. Can you relate again as best you can recall the circumstances and the phone calls?

A Well, I was asked, it was right around 12:00 noon when Judge Thompson recessed to get more jurors, and his courtroom deputy Irene Higginbotham came into my office and said that he needed about fifteen by 2:00 which gave me about two hours. I immediately ran into the clerk's office to get my assistant and I found out she had gone to lunch. The phone rang, they said, "Bea, telephone."

Q Okay. Now, excuse me. Somebody answered the phone other than yourself?

A Yes. Yes, sir. They answered the phone and apparently he asked for me and they said, "Bea, telephone." I took the --

Q Can I just stop you there one second. I don't mean to be interrupting you. Were you told then who was calling?

A No, I was not.

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Q Okay.

A I answered the phone. I picked up the phone at -- it was at Kathy's desk right outside of Mr. Bonsiero's office, and I suppose I said, "This is Bea." I usually do. Or, "This is the jury clerk," whatever, and he identified hisself as Ted Richardson and said, "Are there any blacks on the jury?"

And as I remember, it shocked me. I think I said, "What?"

He said, "Don't get any blacks in," or something to that effect.

Actually at that point my mind was on getting jurors in here in two hours, and I think I answered him to the point as, "Well, I'll do what I can. I've got two hours to do this in," or more or less, you know, whatever.

And I went back to my office and started to calling. And just about that time, Judge Brett's jury had reached a verdict and I sent the ladies to lunch and I told them to be back by 2:00. There was six ladies on that jury. One of them was black and she came back.

Q How about the other six men on the jury -- Is it a six-man jury?

A Six women.

Q I mean, but a six-person jury.

A Yes, uh-huh. Yes, uh-huh. It was a civil case.

Q Okay. All right. Now, the first word you heard from

him, Mr. Richardson, "Are there any blacks on that jury?"

A He identified hisself and said, yes -- I mean, yes, this is what he said. "Are there any blacks on the jury," or something to that effect.

Q And his next words were, "Don't get any blacks."

A "Don't get any blacks in on it."

Q Are you positive of that?

A I cannot be positive word for word, but it was -- that was the nitty-gritty of it. I repeat: Judge Thompson had issued an order for fifteen jurors in two hours, and that means call them and get them in in two hours, and that's where sort of my mind had blocked out.

Q Was there any doubt in your mind that what he was telling you was that he didn't want blacks on the jury?

A That's the impression I got. I don't take it as a threat. I take it as a request or something.

MR. RICHARDSON: I'm sorry. I just didn't hear the tail end of it.

MR. HADDAD: Took it as a request.

MR. RICHARDSON: A request.

Q (By Mr. Haddad) Now, could the words have been, "How many blacks are on that jury," the first words?

A I don't know. Now, as I remember it, he said, "Are there any blacks?"

Q Okay. But the second --

A And I suppose he meant, straightening my mind out since then, I suppose he meant -- Well, on Monday before, we had qualified over a hundred jurors, and this bunch of jurors come out of that pool.

Q And the second thing he said was he didn't want any blacks on that jury.

A "Don't get any in on the jury."

Q There is no doubt in your mind about that part.

A Well, if it's not word for word, it's what he -- what I took that he meant.

MR. HADDAD: Okay. I don't have any. Do you, Mr. Porter?

MR. PORTER: No.

THE COURT: Mr. Price or Mr. Richardson?

MR. RICHARDSON: Well, is it okay if I ask a few things?

THE COURT: Of course.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q Mrs. Slater, of course I'm Ted Richardson and I know that it's probably uncomfortable, and I am the person, obviously, when you say I identified myself that was calling, that was me. I think that was clear, and I just want to touch base with you.

As I understood your testimony, that when I called, I identified myself and said either Bea or Miss Slater, are there any blacks on the jury, or can you tell me how many blacks are

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going to be jurors? Is that correct?

A I -- if I remember right, you said, "Are there any blacks on the jury?"

Q And I think my question is: I wasn't even aware that there was a jury going on. I mean, I obviously knew that you had been requested to call in some other jurors, and so would there be any problem with the idea being that my question referred to not any particular jury from Judge West or Judge Brett, but just were there any black jurors there?

A I can't --

Q Or that you were calling.

A I can't answer that. I mean, I got the call and as I repeat and have said many times, my mind was -- Well, in my job you definitely have to take priorities, and Judge Thompson had issued an order for fifteen jurors and that's where my mind was locked, and I assume that's what you were talking about.

Q Okay. And then, I think that when Mr. Bonsiero testified just a few moments ago, he said that as he recalled it, that you related that I said something along the lines, "We would like to have as few black jurors as possible in this trial involving Mr. Brown and Mr. Porter." Does that kind of ring true?

A Well, what I remember your saying was, "Don't get any blacks on this jury."

Q Okay. Well --

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A Now, I could be wrong in a few words on this because, again, my mind was locked on this -- well, fifteen -- or two hours is not very long to get fifteen people, to call them and get them in here, locate them and get them in here. No offense, Judge Thompson, but I mean, you understand.

Q Yes, ma'am.

A And that's where my mind was locked because I realized that they need to move the trial on.

Q Yes, ma'am. I think that comes down to the whole point of the hearing. Is that what you were interpreting I was saying or are you saying to the Court, and I think that is the exact issue that is very much a concern to the Court, if I said to you, it seems to me totally improper and totally the type of thing that you would get fired or go to jail on if I said to you, "Don't get any black jurors."

A Well --

Q And my question is, are you telling the Judge what I said or that's what you interpreted what I said, "Are there any black jurors on the jury panel," or when I said in reference to the trial of these men, "We would like to have as few black jurors as possible."

A Well, as I remember it, you said, "Don't get any black jurors, blacks on this jury," or something to that effect. "Don't get any blacks on this jury."

Q Or something to that effect?

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A Something to that effect. And like I say, you were the attorney in there and my mind just locked on that case. Maybe I was mistaken, but that's where my mind locked.

MR. RICHARDSON: Judge, that's all I've got.

THE COURT: Mr. Price?

CROSS-EXAMINATION

BY MR. PRICE:

Q Bea, obviously it would, being in your position, you know, even if you interpreted the remarks as being any reference to the calling of jurors whatsoever, it would be your responsibility obviously to bring it to somebody's attention, as you did.

But as I understand what you just said, there was basically a difference in this thing between two statements, and they are not really far apart and we're trying to get at the sureness, the truth one way or the other, what Ted Richardson says he did. And it's probably something that shouldn't be done, but it's of a totally different character than the other conduct. Is that he basically said, "We would like as few blacks on the jury panel as possible," and that, "How many black jurors are there," or something to that effect.

A Well --

Q That could be very easily interpreted as told are there -- it being interpreted as "Don't put any blacks on the jury," as such. What I'm trying to do -- but that's a very critical

difference because it means whether he's doing a criminal type of thing or not. You're saying you're not sure whether it was that strong or not; is that what you're saying here?

A I definitely remember that he said how many blacks -- or, "Are there any blacks on the jury?"

Q So without any doubt, you're sure of that; right?

A Yes.

Q And --

A He identified hisself and said that.

Q We all agree a hundred percent on that.

A And the next thing that you are asking me, I remember his saying, "Don't get any blacks in on this jury."

Q Could it have been very possible, and you're talking about a phone call and you're talking about a busy office and you're talking about -- is it very possible, and it sounds like from the way you're expressing it, that his version of, "We would like as few blacks as possible on the jury panel," is it possible that that was what was said?

A I don't remember it that way.

Q Let me ask you. Is there a real possibility that that could have been what was said?

A I suppose it's possible, but I don't remember it that way. I remember him saying, "Don't get any blacks on this jury." It's possible he could have said it the other way, but I don't remember it that way.

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Q That last remark, as I said, could be interpreted the other way, too, couldn't it?

A Yes. It could be but --

Q Yes. Did you ask him to clarify? In other words --

A No, I didn't.

Q In other words, or say some kind of words that would indicate to him that it was being interpreted in that fashion? In other words, was there some statement from him that -- I mean from you that, "I can't do that. That's wrong," or something like that?

A No, I did not. I do not remember saying that, Mr. Price. What I mostly remember saying is something about I had to do the best I could. I didn't even have my feet on the ground yet, meaning that Judge Thompson had just issued the order, I had two hours to do it and I had to get to work; and the fact of the matter is when you're -- I was going to get anywho I could. You know what I mean. I just -- I had to get a jury in.

Q So you weren't able to really confront him with the phrase that -- I mean with the thing and clarify it one way or the other.

A No, sir. I didn't take time. I got off of the phone so I could get to work.

Q If you had felt totally certain that he was saying, you know, "I'm calling down to order you to" -- An assistant can't

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order you anyway, but, "I'm calling down to order you to keep blacks off this jury," if you felt totally certain of that, a hundred percent that that's exactly what he means, not, "My goodness, that seems like what he was asking me to do," wouldn't you have been immediately inclined to go immediately to Frank Bonsiero?

A I probably would have, but I didn't get it that way. What I -- the way I took it, that he was more or less asking a favor. It was not a command or an order. It was a -- a favor. That's -- Well, actually, when I got this jury in, to be quite frank about it, I didn't think about it anymore because I was calling people, I was working, and I finally went to lunch at 2:30 and that's when I really realized what had happened. And I guess I was in a state of shock because it pondered around in my mind for about 24 hours, and Friday afternoon I felt like I should go in and report it, and that's when I told Mr. Bonsiero.

Q And again, I'm not saying there is anything wrong. It's right in reporting it, regardless of whether you're positive about something like that or not, but in your statement before, you made these statements: "You can't be positive. I could be wrong," and it's real critical that it -- Is it certainly you could be wrong and you can't be totally positive that he said precisely those kinds of words, "Don't put any blacks on the jury."

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A I -- That is what I remember his saying.
Q That is what you were making reference to, "I can't be positive and I could be wrong."
A Well, in a situation like that, the only thing I can do is tell it as near as I can remember it because, again, my mind was on what I should be doing.
Q And so therefore, because your mind was on these other things, you really can't be a hundred percent sure.
A No, I couldn't be a hundred percent sure, but that's the way I remembered.

MR. HADDAD: May I?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. HADDAD:

Q The words were of sufficient import to you that when it dawned on you what he said, you were shocked by it.
A Yes, I was.
Q Okay. And there is no question in your mind that he was asking you a favor to keep blacks off that jury.
A That is the way I took it.
Q Okay. And how long have you been working here at the U.S. Courthouse?
A I've had this job about five and a half years.
Q Has anybody ever called you up in the five and a half years you've been in here to do a favor like that?

A I can't remember it.

Q It would stick out in your mind again if it happened; correct?

A Yes, it would.

Q All right. Now, do you know how many blacks were qualified to be called in and serve as jurors?

A This time?

Q Yeah.

A No, I don't. Out of the fifteen we got in, there was three in it.

Q And were they called in -- one was already on Judge Brett's jury.

A One was on Judge Brett's, and then I called two in.

Q Okay.

A And to be quite frank about that, I did not even know -- realize that because let me make this clear. We had qualified these people, this panel of juries on Monday before, which there was about a hundred and twenty of them. I called the role; but part of the time when they answered, I didn't even look up, and I hadn't worked with these people long enough to know --

Q Uh-huh.

A -- what color they were by name.

Q I'm not even suggesting any impropriety on your part.

A I know, but I -- That would clarify that.

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Q I understand. I understand that. You remarked to Ted, and please don't take this wrong. I'm just going by what you said. When Mr. Richardson asked you to do that, you would see what you could do or something like that, but my feet are to the fire now.

A I said I didn't have my feet on the ground yet. I meant that I had to get to work and get fifteen people in here, frankly, regardless of what color they are, because Judge Thompson had ordered fifteen people in two hours.

MR. HADDAD: Okay. I don't have anything else. Senator?

MR. PORTER: (Nods no)

THE COURT: Bea, there are two primary concerns or questions to be dealt with here. One is the propriety or impropriety of Mr. Richardson's phone call to you in its own sake, and that would have to be looked at and dealt with by someone. The other is whether his comments to you, whatever they were, resulted in any effort on your part to provide additional jurors for our trial of any racial basis.

THE WITNESS: No. No. It did not. Again, I say I got fifteen people the quickest way I could. Again, I will say that what he -- what had happened, really, I didn't have time for it to enter my mind and pry on my mind because I had to get fifteen people in here regardless of the color, and I might again say I've never -- or I might say I've never gone by color. I've just gotten people that I felt were qualified.

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THE COURT: Is there anything at all that happened in the jury selection process of this case, including your providing us with jurors from which to make those collections, that was any different because of Mr. Richardson's phone call to you?

THE WITNESS: No, sir.

THE COURT: And may I safely conclude, then, that our jury in this case and all the jurors from whom we had to draw, were provided completely free of any selection effort on your part pursuant to Mr. Richardson's request or otherwise?

THE WITNESS: Right.

THE COURT: Based on race?

THE WITNESS: That's right.

THE COURT: Do you know of anything that has been said or that has been done that would cause anybody to question the truthfulness or accuracy of that answer?

THE WITNESS: As far as my part is concerned, no.

THE COURT: Well, do you know of anything that was said or done --

THE WITNESS: No.

THE COURT: -- on anyone's part --

THE WITNESS: No, I do not.

THE COURT: -- that would cause that answer to change?

THE WITNESS: No.

THE COURT: Anything else?

MR. PORTER: No, sir.

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THE COURT: Thank you, Bea. I'd appreciate it if you would hold this in confidence for the time being.

THE WITNESS: I will do that. Thank you.

THE COURT: Based on what we've heard, and I think we have been obviously heard from everyone who had any knowledge of this at all, it is my belief that the jury in our case and the jury panel from which this present jury was selected was free of any kind of manipulation or slection on the basis of race or anything else irregular or improper. That is my conclusion. Is there any challenge to that conclusion?

MR. PORTER: None by us.

MR. HADDAD: Not to the jury, no.

THE COURT: Therefore, I think there is no reason to disrupt the jury deliberation in the trial on the basis of the issue that we're dealing with; and that was my belief initially when I first inquired of Mr. Bonsiero and then of Mrs. Ritter. But I think now all parties have had a full opportunity to inquire, and I'm satisfied, and apparently the defendants are as well, that there is no basis for disrupting this trial.

That leaves, then, the first concern of the phone call from Mr. Richardson to Mrs. Ritter, and frankly, that falls into the category of possible prosecutorial misconduct or some other character of concern that is really outside of this case and outside, I think, of my responsibility in this case, and rests primarily now with Mr. Price and the Department of

Justice and to whatever extent that the facts and circumstances suggest.

MR. HADDAD: Sir?

THE COURT: Yes.

MR. HADDAD: I didn't mean to imply that we don't think there was still prosecutorial misconduct in this trial and since this trial is infected, they should be granted a new trial if there is a conviction. We haven't had time to do certain things that we're looking into as well as the motions and memorandums and so forth.

I think our position is that as to the jury, because of this hearing, there is no need to disrupt the jury itself and for them to consider it, but I don't think we could foreclose this issue completely and say that there is not, taking this coupled with other things that has come to our attention, that ought not be amenable to a motion for new trial if there be a conviction and I'm not -- I'm again not trying to be argumentative with the Court at all. I don't want the record to think we're waiving something and we consider this matter foreclosed as to this trial. Only as to the jury.

THE COURT: Of course. You have made a record in reference to the exercise of peremptory challenges and even to my excusing one or more jurors for cause in this case, and I understand that you have some objection to that, and I've already evaluated those objections and ruled on them, and they

are available to you to reurge on a motion for new trial if there is a conviction and certainly to be reviewed on appeal. My concern, among others, under the circumstances is whether the telephone call resulted in any tainting of our jury panel, and I conclude, and I think you do, that it did not.

Now, if you wish to couple what has happened with your other objections to urge something of that kind on a motion for new trial, of course you're not foreclosed from doing it, but I see no basis on which to interrupt the jury in their deliberations.

MR. HADDAD: The reason we're saying this is obviously if we had known it earlier, well, I don't know if we could have apprised the jury of it, but it certainly would have gone to the scope and character of the type of prosecution that we said was going on in this case. That is, the granting of immunities to witnesses and such, gross deals and all this stuff, as against Ponder and Brown. I think had the jury been apprised of the attempts, I would have called Miss -- the lady as a witness in the trial. Absolutely without question, I would have called this lady as a witness in the trial if I had been apprised of that.

I think it goes to the character of the prosecution in this case. We have said and Mr. Richardson said in his final argument, "Do you think the government would do this? Would do that, would do the other thing," and honest to God, Judge, I

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Man, I don't get shocked by anything anymore. I've been around too long, but I really believe that would have had a substantial impact on that jury; and it certainly, while it might not be evidence in the case, it certainly would be evidence of bias and some of these other things that certainly would have shown the character of the prosecution. At least I would have been able to make a record during the trial as to whether that person could have been produced as a witness to show that not only has Mr. Richardson had persons -- you know, we have admitted perjurers in this case, we have that, we have the other thing, and it's been our theory of the defense that these people all sold -- testified against these people to save themselves; and just to show the character of the prosecution when Mr. Richardson appears in there and says, "Our government wouldn't do this or that or any of the other things," and here is at least the issue raised of whether he contacted the jury selector to deny these defendants black -- their race and a jury of their peers. I think it would have had a substantial impact on a jury.

We've had a jury out now six hours, seven hours deliberating. I think it would have had a substantial impact. It's obvious, because this is a pretty clear-cut case, that they are hung up on something, and something of what we said must have washed; that I think it could have had a substantial beneficial effect upon the defendants to have called this lady

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as a witness and put this before the jury. I think it could have properly been put before the jury in this case.

MR. PORTER: And if the conduct was improper in that extent before any evidence was taken, then it raises the high possibility that the conduct could have been improper in preparing the case for trial. For example, it was undisputed that Mr. Richardson, the FBI agent, Terry Holley and Mr. Mustin and another person met at the county jail over the weekend and had conversation.

Now, it goes to whether or not the misconduct on the part of -- it certainly raises an inference if a prosecution was going to be that bold, that it also could raise the probability that they were bold enough to suggest to witnesses what to say. They visited with these witnesses, they had control of these witnesses, they have made deals with these witnesses, inference as to what to say and what not to say; and so when it comes to misconduct on the part of the prosecutor, the act of even calling that jury clerk was improper on his part.

And in furtherance of Fred's argument, part of his closing argument went to to the very essence, "If you think we've done anything wrong and we've tried to in any kind of way railroad these people to the penitentiary, then turn them loose," but that was part of his argument, knowing full well at the time that that argument was made, that at least he had picked up the telephone and called the clerk, the jury clerk

before any evidence was taken, to try and determine or possibly prohibit a black citizen from serving on the jury.

So it goes to misconduct prior to any evidence, even prior to the jury being selected, and that raises in my mind whether or not misconduct occurred. And I probed extensively on that about your visits with Mr. Richardson, who was present, when they took place, whether or not these witnesses were fudging or shading their testimony or giving their testimony in a light most favorable or suggestionable by the government, from the IRS agent to codefendants and unindicted co-conspirators who were involved in this case. And if that misconduct in fact occurred, there is not any question about it, it certainly occurred prior to the jury being selected.

I cannot conceive that if I had picked up a telephone and called that clerk and said that or even gave that impression to her, I shudder to think, as a defense lawyer, I just shudder to think what would have happened, had either Fred or myself called her and said, "Try to keep any blacks off" or -- I mean, "any whites off. How many whites are you going to call? Try to get all black jurors." It goes to the very essence of tampering with the jury even before the jury is selected, and that kind of misconduct causes me, as a defense lawyer, to not believe that perhaps the prosecution in the preparation of this case and the production of their witnesses necessarily acted in all sense of fairness or in all sense of honesty.

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And for that reason, I think that even though the jury was not picked as a result of any acceptance of that call, it is to the misconduct of the prosecutor in the case -- in the case itself and images and taints the whole process of a fair and impartial jury, whether the jurors were receptive while or not and who knew it had the ability to influence that or not because very -- I don't question that he did not have any ability to choose that jury, but I question his role of misconduct as it relates to who every person is entitled to and that's a fair and impartial trial, without tainting the trial where one is denied a fair trial.

MR. HADDAD: There is no way we could reopen the evidence and put Mrs. Slater on as a witness?

THE COURT: Not after six or seven hours of deliberation, I think not. But of course, once those issues are raised, the motion for a new trial, if there is a conviction, of course may will be considered.

(Court room Deputy Irene Higginbotham hands instrument to the Court.)

THE COURT: And it is a very troublesome situation in many ways, and Mr. Richardson's explanation differs from Mrs. Slater's in many important ways.

And I'm advised that we do have verdicts on two of the counts, but the jury is not yet able to reach verdicts on the other two counts in a note that I've just been handed, and

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we'll deal with that in just a moment.

Just to close the record on this, Mr. Richardson, would you care -- and I might also say that by letting the trial proceed to verdicts now of course does not foreclose and I did not mean to suggest that it should or would foreclose your raising anything on appeal relating to any of this, in combination or independently; and any such issues would be carefully evaluated if they are so raised. And neither does the concern or the further inquiry about this matter end with the verdict in this case or a ruling on a motion for new trial. It's a concern to all of us and a very unfortunate set of circumstances that I think, in fairness to everyone, needs to be given a full consideration. And just what form that further consideration should take is not clear to me at the moment, but more thought will be given to that.

Mr. Richardson, did you want to say anything further before we close the record on this hearing?

MR. RICHARDSON: Yes, I would like just to make a statement to the Court and to the defendants and of course to Mr. Price that, you know, looking back now, my God, I regret making that phone call so much, and I don't think that we can avoid the statement that it clearly appears improvident today; and when I first heard, when we sat in there at noon, heard Ms. White read back what Mrs. Slater had said that I had said and what you had summarized, it was very clear that she said and

you summarized it, exactly the words, I wrote it down, "Don't get any black jurors," and I was thinking to myself, "My God."

And I wrote it down and gave it to Mr. Price. You know, that's the type of statement that is clearly a crime and just absolutely unacceptable in anybody's book and would be thoroughly improper on behalf of me. I think that what we heard from Mr. Bonsiero and Bea today kind of, I hope, showed what I tried to tell the Court all along was not what I had said.

And from hearing Mr. Bonsiero testify as he recalled it that Bea had said that I had said something along the lines, and he was of course just paraphrasing and he didn't hear the conversation, that he recalled her saying that I had said, "We would like to have as few black jurors as possible," which is exactly either I'm sure what I said or close to that, as if, you know, if the entire panel had been there originally, looking back, and I was hoping on the jury panel that heard the case, for the reasons I've stated in Mr. Porter's influence, I was hoping to get as few black of the jurors, not the ones come in but as few jurors as possible, and Mr. Bonsiero I think testified under oath that she said to him that I asked her, "Can you tell me how many blacks are coming in?" And then when Mrs. Slater testified, she said that after she thought about it she said, "Gosh, that appears so improper. I just have to report that to my boss or the Judge," and she did that and

there was a question as to whether or not I said, "Don't get any blacks," or whether or not I was asking for a favor like, you know, "Do me a favor, Bea, and exclude people that are black."

And my point is simply this, Your Honor. That of course I didn't do either one. I didn't say, "Don't get any blacks," as if I was big enough to command her to do anything, and her original statement I think to you and to Mr. Bonsiero of that's what I had said, "Don't get any blacks," that's not the type of statement that you make if you're asking for some type of favor, and my point is simply this. That clearly such an improper phone call looking back, even inquiring as to what constituted the panel, I wish had never been made, but I think that the -- or it appears obvious to me that the more she thought about it, that it did seem more and more improper, and that it just got blown out of proportion, and it all goes back I think what I told the Court originally before I had heard what she said or before I knew what Frank had said and I was under oath, and I said, "I called her and I remembered the discussions and identified myself and I simply asked Bea, 'Can you tell me how many black jurors are coming in?'"

And you know, I truly regret to both defense attorneys and most importantly to the office of the United States Attorney's office and more importantly to you, making the phone call because I think it appears, the appearance of these anyway

is bad; but there was no attempt at all. And I'm saying I guess I'm still under oath, that I never told Bea, "Don't bring in these blacks." That's all I have to say.

THE COURT: My proposed answer to the jury is that they should reach verdicts on all counts and to please continue their deliberations. I think that's the appropriate response at this time. And if they continue to have difficulty, it could be handled a different way. Is that agreeable to both sides?

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

(Close of requested transcript of proceedings held on June 20, 1984)

* *

I certify the foregoing is a true and correct transcript.

Theresa A. White

Theresa A. White, CSR, CP, CM and Official Reporter for the United States District Court, Western District of Oklahoma.

6-25-84
Date

APPENDIX D

IN THE UNITED STATES COURT OF APPEAL
FOR THE
TENTH CIRCUIT

Case No. 84-2290

UNITED STATES OF AMERICA,	)
Plaintiff/Appellee,	)
-vs-	)
WILLIE DAVIS BROWN, a/k/a WILL BROWN,	)
Defendant/Appellant.	)

BRIEF OF APPELLANT BROWN

[On Appeal from the United States District Court
for the Western District of Oklahoma]

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Telephone: (305) 467-6767

Counsel for Appellant BROWN

APPENDIX E

ARGUMENT

POINT ONE

THE COURT ERRED IN ADMITTING "SIMILAR FACT EVIDENCE" [RULE 404(b)] IN THE TRIAL OF THIS MATTER, THEREBY PRECLUDING A FAIR TRIAL.

The Appellant has, he feels, fairly well set forth the facts adduced at trial. The documentary evidence vis a vis the Appellant was the Western Union check in 1983 Sam Ponder for $9,500, and Appellant's, Ponder's, and Holley's phone records which show a great deal of calls between Appellant and Holley's girlfiriend's house and vise-versa [whether Holley was ever ther or whether Appellant was in fact talking to Holley's purported girlfriend was never established].

During the course of trial, however, the government offered as a witness Ralph Hernandez, a deputy sheriff from Broward County, Florida, who around December 1980 was working airport surveillance at the Fort Lauderdale airport (R. Vol. VI, pp. 291-293).

The Appellant objected to the witness testifying, after hearing the government's proffer, however, the Court overruled the objection and the witness was allowed to take the stand (R. Vol. VI, pp. 286-296).

Hernandez testified that on 5 December 1980 he and his partner Ralph Capone were working at the Fort Lauderdale Airport, when they saw two men walk into the airport, each man carrying

APPENDIX E

a suitcase (R. Vol. VI, pp. 291-296). Hernandez testified as to "eye contact" and the usual "profile" characteristics.

The men went to the ticket counter and after a ticket was purchased by John Slaughter a/k/a John Banks, Appellant Will Brown handed him a suitcase, which Slaughter checked (R. Vol. VI, pp. 296-298). It need be noted the suitcase Brown was carrying had a name tag on it - that of Johnny Banks, the name in which Mr. Banks or Slaughter's airline ticket was also issued (R. Vol. VI, p. 296).

After Banks checked the luggage, Brown departed the airport and the police then confronted Banks. As they came downstairs, Hernandez stated they saw Brown by the Delta paging counter (R. Vol. VI, pp. 301-303), talking to a ticket agent (R. Vol. VI, p. 304).

The luggage was retrieved, and in Mr. Bank's suitcase that Brown carried into the Airport and handed to Banks, was found fourteen (14) pounds of marijuana, wrapped in a garbage bag (R. Vol. VI, p. 305). In the suitcase Banks carried was found a loaded .38 caliber revolver; on Bank's person was found some seventeen to twenty thousand ($17-20,000) dollars; Banks also had an address book with Brown's name, address, and phone number (R. Vol. VI, pp. 305-306). Both men were arrested for possession of the marijuana found in the suitcase. However, Banks plead guilty to the charge, while the State of Florida declined to prosecute Mr. Brown, (R. Vol. VI, pp. 314,315; compare 309,310, 312-315 and 318 regarding credibility of the witness) on what Appellant suggests is the obvious, lack of knowledge on the part of Brown. In fact, the best that the 404(b) evidence

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illustrated is that the Appellant was present at the scene of a crime, and have been unwitting assistant by aiding someone he knew by carrying his bag into the airport. There was no evidence to even remotely suggest Brown had any knowledge of criminal activity vis a vis Banks, yet alone, that he was part of the same (cf: Redirect and Recross, R. Vol. VI, pp. 316-319).

After the trial court gave its 404 limiting instruction (R. Vol. VI, p. 320), the Appellant again moved to strike the testimony, and for mistrial, which were denied (R. Vol. VI, pp. 320-322). The Appellant filed his Motion for New Trial grounded in part, upon the lack of sufficient evidence, and particularly noted the same regarding the 404(b) evidence in his Memorandum. This issue was addressed by the trial court in its order denying a new trial (See: R. Vol. I, p.59 [page 6 of the actual 12 page order]). Appellant submits, therefore, that admission of the 404(b) evidence was error; further Appellant submits [without alluding to further arguments regarding sufficiency of evidence made below] that when culled of the 404(b) "evidence", the evidence is not sufficient to sustain the conviction, or, in any event, a new trial ought be ordered.

Rule 404(b) provides:

> *"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident".*

As this court succinctly stated:

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> *"Fed.R.Evid. 404(b), which prohibits admission of evidence of other crimes, wrongs or acts in order to prove the character of the accused, allows this evidence for other purposes, such as proof of intent or motive. In addition, the evidence must have real probative value, not just possible worth, be close in time to the crime charged and be so related to the crime charged that it serves to establish intent."* [United States v. Johnson, 734 F.2d 503 (10 Cir. 1984), citing United States v. Nolan, 551 F.2d 266,271 (10 Cir.); United States v. Parker, 469 F.2d 884,890 (10 Cir.)].

The first rule that need be remembered, before this evidence may be admitted and which is sorely lacking instantly is that evidence of the "other crime wrong or act" must be established by "clear and convincing" evidence [See ie, United States v. Bailleaux 685 F.2d 1105 (9 Cir. 1982); United States v. Two Eagle, 633 F.2d 93 (8 Cir. 1980); United States v. Herrera Medina, 609 F.2d 376 (9 Cir. 1979). The Appellant would submit that by no stretch of the imagination did the evidence prove any knowing wrongdoing or any illegal act by Mr. Brown in Fort Lauderdale, Florida.

Upon this thereshold issue, the Appellant therefore suggests, that the Court erred in admitting the evidence and thereafter refusing to strike the same, as all it could prove was, at best, perhaps bad character by association, or a propensity to committ a crime.

Further, the Appellant would submit that none of the criteria set forth in the rule were material issues for admission of the evidence. Through cross-examination, the Appellant sought

to establish that the three convicted, testifying Co-Defendants, who were at best of an unworthy character as to believability, were untruthful when they sought to place Mr. Brown in the conspiracy and the source of the drugs in Florida. On the basis of this defense, the Appellant would submit the admission of the evidence was erroneous [cf: United States v. Powell, 587 F.2d 443 (9 Cir. 1978].

Too, any relevancy, if any there be was at best minimal while the chance of resultant prejudice was so great that the evidence ought have been excluded [cf: United States v. Johnson, 254 F.2d 175 (2 Cir. 1958); United States v. Cox, 487 F.2d 634 (5 Cir. 1973); and see particularly: United States v. Mann, 590 F.2d 361 (1 Cir. 1978)].

It need be noted, of course, that the prosecutor, while not overly dwelling upon this issue in final argument, did certainly employ the same in a manner to show "propensity" on the part of the Appellant. And, while the Appellant is arguing sufficiency of the evidence below, the Appellant would assert that the use of this evidence prejudiced the Appellant to such a degree as to compel a conviction by its very use.

Thus, were the Court to find the admission of this evidence improper, the Appellant would also suggest that the harmless error rule is inapplicable. The Appellant submits that this suggestion is bolstered by the fact that the jury deliberated for two days and, in fact, the trial court felt compelled to deliver a modified "dynamite" charge to the jury.

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While a criminal defendant may not be entitled to a perfect trial, he is entitled to a fair trial.

The introduction of what was denominated 404(b) evidence in this trial denied the Appellant that right, and for this reversal ought occur.

APPENDIX E

(3)

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5731

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIE DAVIS BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the prosecutor's use of peremptory challenges to excuse two black jurors violated petitioner's Sixth Amendment right to an impartial jury.

2. Whether the district court properly admitted evidence of petitioner's prior drug-related arrest.

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE DAVIS BROWN, PETITIONER

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THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-7A) is reported at 770 F.2d 912.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. A petition for rehearing was denied on September 12, 1985 (Pet. App. 1C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of conspiracy to possess marijuana and cocaine with intent to distribute, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1A-7A).

1. The evidence at trial showed that petitioner supplied drugs from his home in Florida for distribution in Oklahoma. Several co-conspirators testified concerning his drug dealing.

In particular, the co-conspirators testified that petitioner had supplied large quantities of marijuana that were seized in Florida while in transit to Oklahoma (Pet. App. 2A-3A). The evidence also included testimony from a Florida deputy sheriff who described his previous arrest of petitioner in 1980. In that incident, petitioner was arrested at a Florida airport after giving a suitcase containing seventeen pounds of marijuana to another person (id. at 3A-4A).

2. Petitioner and a co-defendant, Samuel Ponder, are black. At trial Ponder was represented at trial by E. Melvin Porter, a black member of the Oklahoma State Senate. During the jury voir dire the prosecutor used one of his six peremptory challenges to excuse a black juror and one of his two alternate challenges to excuse a black alternate juror (Pet. App. 19D). As a result, no black jurors served on petitioner's jury (id. at 3A). It was later revealed that during the second day of jury selection, before additional veniremen were summoned, the prosecutor stated to the jury clerk that "we would like to have as few black jurors as possible" (ibid.). The jury clerk took no action in response to this statement (ibid.).

The district court questioned the jury clerk in chambers concerning this incident and later held a hearing (Pet. App. 1D-72D). The prosecutor testified that he had asked the jury clerk how many blacks would be called as additional veniremen but had not intended to influence the jury clerk's selection of the potential jurors (Pet. App. 19D). The prosecutor explained that based upon personal experience, he considered Senator Porter a gifted attorney who had a special appeal to blacks in the community (Pet. App. 20D). The prosecutor planned to excuse blacks who knew or had heard of Senator Porter (ibid.). The district court concluded that the prosecutor's contact with the jury clerk, while raising serious questions of potential impropriety, did not affect the integrity of the jury selection process (id. at 62D).

3. The court of appeals, in affirming the conviction, rejected petitioner's contention that the prosecutor's use of peremptory challenges and his contact with the jury clerk violated petitioner's right to an impartial jury. The court concluded that the prosecutor's use of peremptory challenges did not result in a systematic exclusion of blacks from petit jury service. Relying on Swain v. Alabama, 380 U.S. 202 (1965), it reasoned that the prosecutor's use of peremptory challenges in this case did not establish a systematic practice of excluding blacks in "case after case" (Pet. App. 5A). The court condemned the prosecutor's contact with the clerk but concluded that since the clerk disregarded the prosecutor's statement, the contact could not have influenced the jury selection process (id. at 5A-6A). 1/ Finally, the court ruled that the government testimony concerning petitioner's prior arrest was admissible under Fed. R. Evid. 404(b) for the purpose of showing a plan, common scheme, or motive (Pet. App. 4A-5A).

ARGUMENT

1. Petitioner challenges (Pet. 4-13) the court of appeals' conclusion that a defendant must demonstrate a systematic exclusion of blacks from petit juries in order to establish racial discrimination in the exercise of peremptory challenges. This Court is presently considering that issue in Batson v. Kentucky, No. 84-6263 (argued Dec. 12, 1985). This case, involving the exercise of peremptory challenges in response to the particular notoriety of a defense attorney in the black community, is factually distinguishable from Batson. The Court

---

1/ In rejecting petitioner's argument concerning the prosecutor's contact with the jury clerk, the court of appeals stated that the district court thoroughly explained the matter to the jury (Pet. App. 8A). Petitioner notes "as an aside and before argument" (Pet. 6) that the district court did not so advise the jury. The United States Attorney's Office has confirmed that the court of appeals' statement is incorrect. The court apparently meant that the district court had explained this issue to counsel. There was, of course, no reason to discuss this matter with the jury.

may nevertheless wish to hold this petition pending resolution of that case. Petitioner's alternative suggestion that the prosecutor's contact with the jury clerk resulted in reversible error is, however, insubstantial. Both the court of appeals and the district court concluded that this contact had no effect on jury selection.

2. Petitioner also contends (Pet. 13-16) that the court of appeals erred in holding that the district court properly admitted evidence of petitioner's prior arrest. This evidentiary issue was correctly decided and does not warrant further review.

The district court admitted testimony from Deputy Sheriff Ralph Hernandez that on December 5, 1980, he arrested petitioner at a Florida airport after observing him give another person a suitcase that contained seventeen pounds of marijuana. The district court instructed the jury that this testimony "was not to be considered proof of the offense at trial, but for the limited purpose of determining motive, intent, knowledge, absence of mistake" (Pet. App. 4A-5A).

A district court has wide discretion in resolving evidentiary questions. United States v. Abel, No. 83-935 (December 10, 1984) slip op. 9. The district court plainly acted properly in the present case. Rule 404(b) expressly provides that evidence of prior crimes is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Fed. R. Evid. 404(b). In particular, it is well established that evidence of a prior drug transaction is admissible to show a common plan or scheme in prosecutions involving distribution of illegal drugs. See, e.g., United States v. Llach, 739 F.2d 1322, 1327 (8th Cir. 1984); United States v. Smith, 726 F.2d 183, 185-186 (5th Cir. 1984); United States v. McCrary, 699 F.2d 1308, 1311 (11th Cir. 1983). Testimony concerning petitioner's prior arrest was properly admitted for that purpose.

Moreover, the district court's limiting instruction

prevented any prejudice from the evidence. See, e.g., United States v. Llach, 723 F.2d at 1327; United States v. Clemons, 676 F.2d 122, 124 (5th Cir. 1982). The jury is presumed to have followed the court's instruction. See Tennessee v. Street, No. 83-2143 (May 13, 1985), slip op. 5, 7-8; Francis v. Franklin, No. 83-1590 (Apr. 29, 1985), slip op. 16 n.9. Finally, given the ample evidence of petitioner's guilt (see Pet. App. 6A-7A), any error in admitting the evidence would be harmless. See United States v. Hasting, 461 U.S. 499 (1983); 28 U.S.C. 2111. 2/

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari, insofar as it challenges the prosecution's use of peremptory challenges, should be held pending this Court's decision in Batson v. Kentucky, No. 84-6263. In all other respects, the petition should be denied.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
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Attorney

JANUARY 1986

2/ Petitioner observes (Pet. 13) that the court of appeals mistakenly stated that the prior arrest was properly admitted to show petitioner's "propensity" (Pet. App. 4A). This apparently inadvertent misstatement is insignificant in light of the court's subsequent conclusion that petitioner's prior arrest was admissible to show a common plan or scheme (Pet. App. 4A). Given the court of appeals' correct conclusion, its misstatement presents no ground for reversal. Cf. Chevron U.S.A, Inc. v. Natural Resources Defense Council, No. 82-1005 (June 25, 1984) slip op. 4 n.7.

Petitioner also contends (Pet. 16) that the court of appeals departed from a commonly cited rule that evidence of other crimes must be "clear and convincing." The court of appeals did not cite this standard in considering the sheriff's testimony. Nonetheless, it is presumed to have applied the correct standard. See Wainwright v. Witt, No. 83-1427 (Jan. 21, 1985), slip op. 19. Moreover, because the sheriff observed petitioner commit the crime, the standard was met. See United States v. Evans, 697 F.2d 240, 248-249 (8th Cir.), cert. denied, 460 U.S. 1086 (1983).

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5731

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5731

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE

The Petitioner in making but a brief reply to a certain glaring error in the Brief of the United States.

The Petitioner does not have the transcripts of the trial, as he was compelled to return them to the Clerk of the Court of Appeals after writing his brief, but since this Court has a copy of the record, Volume IV, pps. 20, 21 contain relevant material.

The United States, on Page 2 of its brief, recites:

> *"During the voir dire the prosecutor used one of his six preemptory challenges to excuse a black juror and one of his two alternate challenges to excuse a black alternate juror."*

This is error. There were no black alternate jurors, rather, the prosecutor used his challenges [including his last

challenge] to excuse the sole remaining black juror called. Then the Petitioner asked for further preemptory challenges [as he was out] in the hopes of sitting a black juror. This was denied.

It need be remembered that the remaining black jurors were excused by the Court for cause, which was also the subject of the appeal by Petitioner [See: POINT TWO of Petitioner's Appellate Brief hereto attached]; thus, the Petitioner had no black jurors upon his jury, in a manner the Petitioner would assert is in violation of constitutional guarantees as set forth in the Petition heretofore filed.

CONCLUSION

As before, the Petitioner prays that a Writ of Certiorari issue.

Respectfully submitted,

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BY: _____
FRED HADDAD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by mail to Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 15 January 1985.

BY: _____
FRED HADDAD

POINT TWO

THE APPELLANT WAS DENIED HIS RIGHT TO A JURY OF HIS PEERS BY THE EXCUSALS FOR CAUSE BY THE COURT AND/OR THE PRE-EMPTORY CHALLENGE EMPLOYED BY THE GOVERNMENT.

In recent years, more and more cases have evolved concerning the selection and composition of both grand juries and petit juries [See: ie, Hobly v. United States, ___ U.S.___, 104 S.Ct. 3093 (1984), and the cases cited therein].

The instant case presents a "variation on a theme". Appellant, Willie David Brown, is black; Co-Defendant, Sam Ponder, is black; the counsel for Brown is white, however, the counsel for Mr. Ponder was E. Melvin Porter, a member of long-standing in the Oklahoma State Senate, very well known, and also black.

Jury selection in this instance required two panels due to the number of challenges allowed, plus the number ordered for cause. Each panel contained a number of prospective jurors that were black. Indeed, several were called as prospective jurors, however, none served as they were excused either by the Court for cause, or by the prosecutor pre-emptorily.

Generally, obviously, one does not raise the issue that is being addressed presently, but due to certain occurrances at the trial, the same is mandated.

[The Appellant would note that he is still having the Court Reporter search her notes for further objections to

the Court's excusals for cause, for it is apparent from that transcribed, others were made (See: R. Vol. VI pp. 11, 12), and in fact the undersigned so remembers].

As noted, no black jurors served in this cause and each was excused; the second panel called contained three blacks, and after the prosecutor used his last pre-emptory challenge to strike the one black in the box (R. Vol. VI, pp. 20, 21), the Appellant then requested the Court to allow Appellant an additional "one or two challenges in an effort to see if we could seat some black jurors since there [were] several remaining black members of the community in the jury panel" (R. Vol. VI, p. 23). This was in conjunction with a particularized objection Appellant made to the prosecutor's selective use of its pre-emptory challenges to deny the Appellant a jury of his peers (R. Vol. VI, pp. 20, 21). At that time, the Appellant had no idea how prophetic those words would be and thus, will address firstly the prosecutor's challenge or challenges of black jurors.

During the second day of jury deliberation, 20 June, the trial court made known to the Appellants that he had earlier in the week [15 June] been advised that during the jury selection process and particularly after the exhaustion of the first panel, and while the Clerk was using the luncheon recess to find a second, the Assistant United States Attorney called to the Jury Clerk, Ms. Beatrice Slater, identified himself, asked if there were any blacks on the jury, and then said,

"Don't get any blacks in on it." [the new jury panel] (See: R. Vol. V, pp. 48 et seq.; Vol. VII, pp. 756, 767). The undersigned, as counsel for Appellant, when advised requested a hearing particularly because, inter alia, of the "challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both pre-emptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause" (R. Vol. V, p. 16; Vol. VII, p. 725). [NOTE: Mr. Richardson stated under oath that he excused two jurors that were blacks, one in the initial group which does not appear in the transcript, and one in the second group, Mrs. Doris Roberts, which does (R. Vol. VI, pp. 17-19)].

Mr. Richardson was sworn, and admitting calling the Clerk and asking the racial composition (R. Vol. VII, p. 728; R. Vol. V, pp. 19, 20) while denying what Ms. Slater said he said, did state that he said words close to "We would like to have as few black jurors as possible." (R. Vol. V, p. 70; R. Vol. VII, pp. 778, 779).

Mr. Richardson did, however, allow as to his reasons for excluding blacks, and that was because Mr. Porter "has a very special appeal to the black people in the community (R. Vol. V, p. 20; Vol VII, p. 728), and related his story of a State Court trial with Mr. Porter and its result, and then Mr. Richardson allowed that he took into consideration that the Defendants were black and that he planned on excusing

jurors acquainted with black defense counsel Porter (R. Vol. V, pp. 19, 20; R. Vol. VII, pp. 728, 729).

In examining Mr. Richardson, the following was established:

> *"MR. HADDAD: Would you agree that after the rather extensive voir dire that the Judge conducted on all jurors, that that black juror that you exercised your pre-emptory challenge on had stated that she could be fair, she would not be influenced by the fact of Senator Porter and so forth?*
>
> *MR. RICHARDSON: Yes sir, that's correct."*
>
> (R. Vol. V, p. 24; R. Vol. VII, pp. 732, 733).

There is no doubt that generally any party is free to employ their pre-emptory challenges in any manner they see fit [Compare: State v. Neil, 457 So.2d 481 (Fla. 1984), which, while not authority to this Court, treats a similar circumstance and outlines applicable law and holdings].

However, Appellant submits this is not an absolute and in the instant case, the prosecutor, it is submitted, employed his challenges in such a manner as to deny the Appellant his right to have a jury drawn from a representative cross section of the community.

The little law that the Appellant has been able to find that touches the issue present as to the prosecutor is

contained, parenthetically, in United States v. Green, 742 F.2d 609 (11 Cir. 1984), a case involving a different set of circumstances, to-wit: only white veniremen in a panel after two blacks had been excluded the previous evening having just concluded service upon a case involving the exact charge. The Court wrote:

> *"Green is not entitled to a jury which necessarily includes blacks merely because he is black.*"* Id. at 611.

The Court's asterisk refers the reader to the following language:

> *"On the other hand, Green may have the right not to have blacks systematically and intentionally excluded from the pool of prospective jurors in his case by prosecutors or other court officials motivated by a desire to place him at a disadvantage before the jury. Willis v. Zant, 720 F.2d 1212 (11 Cir. 1983). Furthermore, when the prosecutor employs its pre-emptory challenges to remove from jury participation all black jurors, the defendant's right to be tried by a jury drawn from a 'representative cross section of the community' may be effectively denied. This right is probably denied to the same extent it would have been had blacks not been included on the jury lists at all. See: Harris v. Texas, ___ U.S. ___, 104 S. Ct. 3556, 82 L.Ed.2d 858 (1984) (Marshall, J., dissenting) (citing Taylor v. Louisiana, 419 U.S. 522, 528, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975))."*

It is clear that Mr. Richardson's intent was to re-

move all black participation in the jury, and after the Court's excusal of certain blacks for cause, Mr. Richardson employed his pre-emptory challenges to excuse those the Court did not. His stated reasons have been set forth above, and this Court ought find that Appellant was denied his Sixth Amendment guarantees by the prosecutor.

Too, Appellant submits that the trial court erred in excusing juror Upchurch (R. Vol. VI, pp. 3, 4) who stated that she would not be influenced by Mr. Porter or the fact that the juror's mother grew up with Mr. Porter. The Court, rather, excluded the juror because she said it was possible that someone who knew her [the juror] might "fairly conclude that perhaps it is inappropriate for you to sit in a trial in which Mr. Porter is one of the lawyers" (R. Vol. VI, p. 4). Appellant suggests that same is neither inappropriate nor grounds for a sua sponte excusal for cause. And, the Court excused juror Rosales because Porter supported legislation that was beneficial to the juror, and the juror was therefore "supportive of him [Porter] in that respect" (R. Vol. VI, pp. 7, 8). Again, the Appellant suggests this was error, and the Court committed further error particularly in light of the above by not allowing Appellant his request for "one or two" additional challenges in an attempt to obtain some black representation on the jury.

It is submitted, therefore, that the Appellant was denied his Fifth and Sixth Amendment rights to due process

and a fair jury trial in this matter through the deliberate actions of the prosecutor, and what Appellant submits are erroneous rulings of the trial court.

A new trial ought be ordered at the least.

FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5731

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE DAVIS BROWN, a/k/a WILL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 10, 1985
CERTIORARI GRANTED JUNE 2, 1986

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RELEVANT DOCKET ENTRIES

Date	Nr.	Description of Document or Proceeding
05-08-84	71	Indictment (superseding)
06-21-84	118	Order re alleged attempt to influence selection of jurors: ptys & cnsl agreed matter should be held in confidence until jury reached a verdict; dfts reserved rt to be heard on the issue at a later date; verdict reached at 7:00 PM, Wed 6-20-84; accordingly, record on this issue now opened & the court reporter is requested to produce a transcript of such proceedings (THOMPSON) ih
06-22-84	—	Reporter's Transc of Proceedings Had on June 22, 1984, by Theresa A. White CSR
06-22-84	119	MINUTE ORDER: Ct recevied further info re matter of govt cnsl's contact w/jury clk; Ct conducted an interview on record, a transc prepared & avail; Clk directed to notify all cnsl by phone (THOMPSON) ih
09-23-85	269	Opinion fm CCA
09-23-85	270	Judgment (Affirmed) (Moore, Breitenstein & Doyle) (CCA84-2290)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. Cr. 84-43-T

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

SAMUEL MIRON PONDER, aka SAMMIE M. PONDER, aka SAM PONDER; TERRY WAYNE HOLLEY; GREGORY DUANE HOLLEY; WILLIE DAVIS BROWN, aka WILL BROWN; DEFENDANTS

[TRANSCRIPT OF EXCERPTS OF JURY TRIAL]

TRANSCRIPT OF EXCERPTS OF JURY TRIAL HELD BEFORE THE HONORABLE RALPH G. THOMPSON, UNITED STATES DISTRICT JUDGE, ON JUNE 18 & 20, 1984, AT OKLAHOMA CITY, OKLAHOMA.

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(The following proceedings held June 18, 1984)

THE COURT: This is an in-chambers conference. The date is Monday, June 18, 1984. Present are Mrs. Beatrice Ritter, the jury clerk of our Court, in addition to myself and the court reporter. I have asked Mrs. Ritter to speak with me on the record on a matter that she has already reported to me and which needs attention.

It is my desire to handle what I believe is a very sensitive matter in a way that will both preserve recollections of facts, not jeopardize the eventual full exploration of the facts in its regard, and yet not unnecessarily disrupt a significant narcotics trial now in progress.

The sensitivity of the matter is obvious from a statement that I received from the court clerk, Mr. Frank Bonsiero at the close of the day Friday, June 15th, while our trial was in progress. He reported to me that Mrs. Ritter had reported to him that Ted Richardson, the Assistant United States Attorney who is prosecuting this case, had called Mrs. Ritter during a period of time in which Mrs. Ritter was attempting to furnish us additional jurors so that we could complete the jury selection in the trial. We had exhausted all of our initial jurors, and by agreement of all parties, took a little longer noon recess so that she could acquire about fifteen additional jurors so that we could complete the primary jury and also

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select three alternates. During the period in which she was engaged in that effort, it was reported to me that Mr. Richardson called her on the telephone, reached her in the clerk's office and asked her not to include any black people in the additional jurors to be furnished.

When Mr. Bonsiero furnished me that information late in the afternoon on Friday, I told him that I would give the matter careful thought over the weekend and proceed today, Monday, as appropriate. Mr. Bonsiero had assured me that Mrs. Ritter had assured him that Mr. Richardson's suggestion had not been followed; that no selective effort was made in the procuring of additional jurors on any basis; and that in short, the conversation with Mr. Richardson had not resulted in anything other than the completely routine and proper, regular handling of the jurors from her part or on anybody else's part.

This morning I personally and privately interviewed Mrs. Ritter. She stated exactly the same set of facts that Mr. Bonsiero had reported to me, and she assured me that Mr. Richardson's statement to her had not resulted in any effort on her part to honor it or follow it, and that

there was in fact no irregularity whatever in the procurement of additional jurors in our trial.

From that assurance and from knowing her and having complete confidence in her, I concluded on this date that there was no consequence to this trial, however improvident Mr. Richardson's comment to her might have been.

Having reached that conclusion, I decided that I would wait to advise the parties and counsel about it until after the jury was at least in deliberation and possibly until after they had reached their verdict.

My reason for waiting is my concern that the revelation of what has happened might very well generate substantial publicity, and I am concerned that the jury not be exposed to any unnecessary publicity, particularly of a kind that might very definitely influence them or prejudice them in one way or another in reaching their decisions in this case.

I'm equally concerned, however, that the parties and all counsel in the case have a complete and unimpaired opportunity to explore with all appropriate persons what the facts are in this case in this regard, and I intend to give them that opportunity before the record in this case is closed.

At an appropriate time, when the possible exposure to that type of publicity can be minimized or avoided, I intend to have a full, open, evidentiary hearing with Mr. Bonsiero, Mrs. Ritter, and anyone else appropriate for a full exploration of the facts, present for sworn testimony in open court with all parties and counsel present. It is my belief that handling it in this way, that this highly sensitive and important problem can be fully explored without jeopardizing a lengthy and important trial in progress.

I recognize that it is discretionary with the Trial Court as to whether to defer the evidentiary hearing in this regard until a later time or to conduct it by interrupting the course of the trial. I've given this very careful

thought and I am completely sensitive to the need for the investigation of the facts and a complete record to be made in its regard; and I have concluded that this is the balanced, fair, preferable method to use.

Having stated that as a preamble, let me proceed now with an on-the-record inquiry of Mrs. Ritter as to all of the facts of this matter as she recalls it.

First of all, you are Beatrice Ritter, our jury clerk.

THE WITNESS: Let me correct you. It's Slater.

THE COURT: I'm sorry. Slater.

THE WITNESS: Use Slater through that. I didn't interrupt you, Judge. That's fine.

THE COURT: How long have you been our jury clerk?

THE WITNESS: About five and a half years.

THE COURT: And you are the person primarily responsible for acquiring an adequate number of jurors and, when necessary, additional jurors so that all of our trials have jurors for our selection process; is that correct?

THE WITNESS: Right. That's—

THE COURT: And have done that for all the years you've been here in that capacity?

THE WITNESS: That is correct.

THE COURT: Now, you heard me summarize the information that I received, both from Mr. Bonsiero on Friday and from you—

THE WITNESS: (Nods yes)

THE COURT: —this morning, did I not?

THE WITNESS: (Nods yes)

THE COURT: Would you say that I fairly summarized the information both that you gave Mr. Bonsiero and that you gave me this morning?

THE WITNESS: I think you did a very good job.

THE COURT: Now, would you please for the benefit of anyone reading this record, and specifically for parties and counsel involved in this case and for anyone reviewing it at the appellate level, tell me exactly the facts as

they occurred and without abbreviating your statement simply because you've already told me this morning.

THE WITNESS: It was around 12:00 Thursday noon when Mrs. Higginbotham told me that you needed additional jurors. I went to the clerk's office to get my assistant to help me call them. While in there, I received this telephone call. He identified himself as Ted Richardson, and as best I remember, he said something about, "Are there any blacks on the jury?"

And it did shock me. I said, "What?"

He said, "Don't bring any blacks in," something to that effect.

And I said, "I'm going to do the best I can. I haven't even had a chance to get my feet on the ground."

And as I told you this morning, I truly had to take top priority. I had to get the jury in, and I didn't really think too much more about it at that time.

THE COURT: When you say you told him you would do your best, what do you mean by that?

THE WITNESS: I meant that I had to get jurors in, period, regardless of what color they were.

THE COURT: You were not assuring him that you would do your best to exclude blacks, then; is that right?

THE WITNESS: Number one.

THE COURT: Is that right?

THE WITNESS: Right. That's correct.

THE COURT: Your statement, if not explained, could be taken as that.

THE WITNESS: Well, correct. Really and truly, we had only qualified those jurors on Monday before, and I was really not acquainted with the names enough to know whether they were black or white, and I really still am not all of them. But anyway, I just had started calling and Judge Brett had a jury deliberating. There were six women. They came downstairs, and I said, "Go eat lunch and get back. I need you at 2:00."

THE COURT: Had they reached a decision in that case?

THE WITNESS: They had reached a decision, yes.

THE COURT: And had they been excused?

THE WITNESS: Yes. They had been excused back to me, so I sent them to lunch to be back at 2:00. There was a black in them, a black lady, and I still didn't realize this. I mean, I hadn't had time to think about it; and in calling them in, I just got people that could get in the quickest and the best way we could in the two hours that we had to work with.

There were two additional blacks, so that makes three blacks altogether that was called in. And no, I did not follow his request, order, whatever you might want to call it.

THE COURT: Was anything at all done by you or anyone else involved in this jury process to select additional jurors in this trial on the basis of race?

THE WITNESS: No, sir, there was not.

THE COURT: Was anything done that was not completely regular?

THE WITNESS: I did it the same as I'd always done it.

THE COURT: Is there anything that was done that would cause anyone to question whether there was the slightest effort made to select this jury on the basis of race, sex or any other basis?

THE WITNESS: No, sir.

THE COURT: Was it done?

THE WITNESS: Of course not.

THE COURT: Was it done completely randomly within the available jurors?

THE WITNESS: (Nods yes)

THE COURT: And routinely without any such selection effort made?

THE WITNESS: It absolutely was.

THE COURT: And may I conclude from what you've told me, that notwithstanding the impropriety of what you were asked to do, that there was in fact no consequence of that sort with regard to the selection of addi-

tional jurors from which our jury and alternates were selected.

THE WITNESS: No, there wasn't.

THE COURT: Have we now stated for the record, have you now stated for the record all of the facts bearing on this entire matter?

THE WITNESS: Yes, Your Honor, I'm quite sure there is—I mean, I have. I—As I stated, it happened when I was in a hurry and all, but I—after I got the jury called in and got settled down, as I told Mr. Richardson when he called me, I didn't even have my feet on the ground yet. I mean, the word had just gotten to me; and when I did get my feet on the ground, I began to think about what he had said; and to be quite frank about it, I was in a state of shock.

THE COURT: Did you get the impression from Mr. Richardson that he was joking with you or—

THE WITNESS: (Nods no)

THE COURT: —making some kind of a light-hearted remark or—

THE WITNESS: (Nods no)

THE COURT: —did you conclude that he called you for the purpose of seriously asking you to do what he asked you to do?

THE WITNESS: I didn't take it as a joke. If he meant it as a joke, in my opinion, it was a poor joke.

THE COURT: Well, it is such an unlikely thing to have happened.

THE WITNESS: That's right. I'll agree with you.

THE COURT: That I have to ask if—

THE WITNESS: This is true.

THE COURT: —it was done in a jocular vein or if there was anything about the way it was said that would give you any doubts about that,—

THE WITNESS: Well, I certainly—

THE COURT: —the seriousness in which he asked it.

THE WITNESS: I certainly didn't take it as a joke. I—after I, as I said, got my feet on the ground and

thought about it, I think he was in dead earnest. Maybe I'm mistaken, but I think he was.

THE COURT: Now, one of the reasons that I have hastened to have this private, on-the-record interview is so the facts, as you know them, can be as fresh on your mind when it is recorded now as they can be. Because if this case takes another two or three or four days to try, we will be that many more days removed from the event, and that is my intention here is to record the facts as they are best recalled and in as fresh a state as we can get them.

Is there anything else that happened that you can think of?

THE WITNESS: I can't think of anything right now, Judge.

THE COURT: Have we covered the entire subject matter as far as you know?

THE WITNESS: We—yes, we did. I really will—can't say word for word; but we did get, you know, the nitty-gritty of the pertinent facts of it. I, as I stated, was in a hurry and had—because I only had two hours to do this and I knew it was important, and I didn't even realize what had happened until after I got them in and got to thinking about it.

THE COURT: Once you thought about it and became concerned enough to report it to the Court and clerk, did you relate to him the same facts that you've related to me on this record?

THE WITNESS: Yes, sir.

THE COURT: And you heard me summarize at the beginning of our interview what facts he related to me.

THE WITNESS: Yes, sir.

THE COURT: And was that accurate?

THE WITNESS: He—yes, it was correct.

THE COURT: Thank you.

(Close of requested transcript of June 18, 1984 proceedings)

(Following proceedings held in Judge Thompson's chambers on June 20, 1984 at 11:05 a.m.)

THE COURT: This is an in-chambers conference with Mr. Richardson. I've asked Mr. Bill Price, the U.S. Attorney, to join him and us, and Mr. Porter and Mr. Haddad for the purpose of my sharing with them some information that I have received during the course of this trial. It is also for the purpose of my sharing with them the initial step that I took in regard to the information that I've received, and for the further purpose of offering to conduct an evidentiary hearing as may be requested by either or both of the defendants or perhaps the government in regard to what I'm about to tell you.

You will recall that in the selection of the jury, we ran out of jurors in our first group; and for the purpose of completing the jury, both primary and alternate, we took an extended noon recess and requested the jury clerks to provide additional jurors for that purpose, and she did that.

It was reported to me that during her efforts, during the noon recess, that Mr. Richardson telephoned Mrs. Bea Slater, our jury clerk, and requested that she not include any blacks in the additional number of jurors being arranged for. Mrs. Slater reported that to the court clerk, Frank Bonsiero, who in turn reported it to me, and this occurred late Monday evening. I'm sorry. Late Friday evening after the trial had recessed.

On Monday, I asked Mrs. Slater to come to my office, and I privately inquired of her about the information that I had received from Mr. Bonsiero. I made that inquiry in her presence, in the presence of the court reporter only, to determine what she had to reveal and to determine what steps I should take and when I should take them.

Mrs. Slater reported to me that during the noon recess when she was busy trying to arrange for some fifteen additional jurors at my request, that she had received a telephone call from Mr. Richardson, receiving

the call in the court clerk's office, and that Mr. Richardson had indeed said, in effect, "Do not include any blacks in these additional jurors that you're arranging for."

I asked Mrs. Slater if she did anything to honor his request or to give it effect, and she assured me that she did not, that she arranged for fifteen additional jurors without regard to any racial or other basis; and in fact, I believe three of the fifteen or one-fifth of them were in fact black.

In any event, she assured me that nothing in the jury selection process was altered by the reason of the request that she said she received from Mr. Richardson; and I recall that we did have black people among those additional jurors; and concluded, therefore, that while there was a serious allegation of prosecutorial misconduct, that it had had no consequence as far as this case is concerned, and that the selection of the jury for this trial had not been affected at all by reason of what Mr. Richardson had reportedly asked of Mrs. Slater.

In that belief and based on those indications, I elected not to disrupt the trial by acting on the problem during the course of it, mainly because I did not want any publicity surrounding this information to possibly contaminate our jurors; and I believed, because it had apparently had no consequence to our trial, that my revelation to you gentlemen and any hearing in its regard could wait until the jury was in deliberations and therefore not as exposed to any publicity that this might generate as they would at any other earlier time.

My concern is great. I want Mr. Richardson to have an opportunity to respond to the information that I have just shared with you, and I want the defendants, through their counsel, to have the opportunity, as well as Mr. Richardson, to have the opportunity of inquiring of Mrs. Slater and satisfying themselves on the matter, and I make that opportunity available to both sides.

Mrs. Slater is here, she's standing by and we can do that at any convenient time. I would suggest that if we

are to have further inquiry or an evidentiary hearing, that it should be done as promptly as possible before a verdict is reached, and I certainly want both sides to have an opportunity to be heard in this regard. But obviously it's a matter of great concern to all of us, and I conclude my remarks to you this way. You know all that I know now. Mrs. Slater is available and we'll proceed as appropriate and as requested. And I do not require Mr. Richardson to make any comment at all now unless he wants to.

MR. RICHARDSON: I do.

THE COURT: But I also want to be very clear in that I do not suggest or propose that this matter be conducted in its entirety behind closed doors in chambers. This is a highly sensitive matter. Counsel may feel that they should inquire of Mrs. Slater in regard to its possible effect on their case; and if that's requested, it should be done in open court with the defendants present so they can satisfy themselves in that regard. And I'll proceed as you gentlemen request.

MR. HADDAD: Because of challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both peremptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause, I particularly would request an evidentiary hearing, and I don't mean that to be—but I think for the preservation of the record, particularly with this occurring, which to me is somewhat overt racism in a selection of a jury with black defendants. And I think when one considers—I don't know how to—let me just review my notes, but there are some things that caused concern considered during the course of this trial that, all taken together, I think we need an evidentiary earing because some due process rights may have been violated.

THE COURT: Mr. Porter?

MR. PORTER: Well, I wasn't convinced in my own mind that an evidentiary hearing was going to be neces-

sary; but in light of what Fred has said, I would like an opportunity to confer with him and so we might be able to at least be together on whatever is to take place.

THE COURT: All right.

MR. HADDAD: I didn't mean to speak for you. That was my initial thought. I haven't had time to reflect on it even.

MR. PORTER: I understood that.

THE COURT: I think that before anyone makes a decision on anything that we should take a little recess and let all of you confer as you see fit.

MR. PORTER: Right.

THE COURT: Did you want to say something, Mr. Price?

MR. PRICE: Well, essentially I wanted to have Ted have an opportunity here first to respond because I think you all may decide, you know—And again, I don't know what the response is or whatever, but having a hearing in open court on something like this may be justified or it may be something that besmirches his reputation, too, and you all may, after hearing the explanation, decide that that is not something that should be done; and so what I'm suggesting is that I think that we first should hear the explanation, and then you all making a decision in your own heart whether this is something that should be the subject of an evidentiary hearing.

MR. PORTER: All right.

THE COURT: Let me ask everyone this first of all, or state for the record, and for your benefit: I have not revealed this with any of you. You will acknowledge that, will you not all?

MR. PROTER: Yes, sir.

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

MR. PRICE: Yes, sir.

THE COURT: So that everyone comes to this moment on an equal basis as far as any information is concerned.

MR. PRICE: Absolutely.

THE COURT: Would you prefer to talk with Mr. Price before commenting, Mr. Richardson?

MR. RICHARDSON: No, sir. I would like to be sworn in, and I don't need to confer with anybody about what I want to tell the Court, and I think what I have to say, we need to be on the record; and then Mr. Porter and Mr. Haddad can make their decision from there.

TED RICHARDSON

being first duly sworn, testified as follows:

THE COURT: Mr. Porter and Mr. Haddad, are you agreeable to inquiring at least initially without the presence of your clients?

MR. PORTER: Yes, sir.

THE COURT: Under these circumstances?

MR. RICHARDSON: Yes, Your Honor. I can tell you specifically, I did call Mrs. Slater. I recall at the time it was, I guess on Thursday when we were selecting the jury panel and when we had run out of jurors. There was some kind of break maybe for lunch or something like that, and some more were called in.

I called her and I specifically asked her if she knew how many blacks or anything like that, if there were any way to tell how many black people were going to be called into the subsequent number of jurors, and she said, I believe, that she didn't know; and I specifically wanted to know because that affected what the composition of the jury panel was.

I never asked Mrs. Slater not to call any black jurors. I just simply wanted to know how many, if she could tell, were in the group that were coming in.

During the voir dire or the selection process of the jury, there were some black jurors. Several were excused, as I recall, by the Court. I excused one during the regular group that we were selecting, and then in the subsequent group, I selected another. It wasn't racist on my part to excuse those particular jurors; but I think,

in all candidness, I've tried cases with Mr. Porter before, and I think he's a marvelous opponent. He's very good in everything, and he also has a very special appeal to the black people in the community.

And the one trial that I can think that we had together that actually went to trial, Judge Smith got kind of worn out with Mr. Porter and myself and said, "Men, I'm worn out with you two. I want you to take the first twelve jurors and not excuse anybody," which we did. There were six black and six white jurors on that case. It was a robbery, and it appeared to me an open and shut case. The man was caught there with the purse and the money and everything. We had a hung jury in the case, six to six, along the racial lines.

And so all I'm telling the Court is that I did take into consideration the fact that these people were black and that almost everybody—I would think they would be an incompetent juror, almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was.

And my request of Mrs. Slater was not in any way to get her not to call any jurors or to pick and choose among the people that, say, the government would want; but I did want to know if possible in advance who would be the—not their names, but if there was any way to know how many black jurors would be coming in the additional group because I knew at least one or two of them would be on the jury panel itself, and I don't know what else to say about that.

I would be glad to answer any questions that the Court has or that Mr. Haddad or Mr. Porter or—I thought that was Bea back there—that anybody would have.

THE COURT: Mr. Richardson, are you able to recall with specificity what you said to Mrs. Slater in that conversation?

MR. RICHARDSON: I can't repeat it verbatim, Your Honor, but I specifically remember the conversation, and

you know, I thought at the time, well, maybe I shouldn't call and even inquire; and I do specifically remember the conversation and everything that was said, yes, sir.

THE COURT: Are you sure, then, that you did not ask her to select the new group of jurors on any racial basis?

MR. RICHARDSON: I'm positive I did not ask her to select or choose anybody on any basis, but I did specifically ask her if she could say, you know, if these were black or white people, yes, sir.

THE COURT: Mr. Price, do you have any inquiry of Mr. Richardson?

MR. PRICE: There wasn't any kind of even a kidding reference in any way to—Obviously you don't have any influence over a court clerk, an Assistant U.S. Attorney doesn't, any ability to get them to do anything you want them to do. Is there any possibility that you made any kidding reference to that that she could have misinterpreted?

MR. RICHARDSON: I think that the attorneys would just have to ask Mrs. Slater. I don't think so. I—I may have said something along the lines I would sure like to know how many blacks are coming because I, you know, know simply that Senator Porter has a big influence on the black population. But in reference to anything to indicate don't call blacks or pick and choose among them or something like that or even kidding about that, there wasn't any.

MR. PRICE: Did she express to you any concern about this conversation? Did she say that what you're doing—

MR. RICHARDSON: No, she didn't.

THE COURT: You're telling me to do something I shouldn't do or something like that?

MR. RICHARDSON: No. She just said, "Ted, this is who we're calling from and I'm trying to get the people in right now."

MR. PRICE: And it was just a few second conversation or was there anything beyond that that you recall?

MR. RICHARDSON: You'd just have to ask Mrs. Slater, really, about that. I don't think it was more than maybe, maybe two minutes. I don't know. It was a very brief conversation. That's all I know.

THE COURT: What was your purpose in asking for a numerical breakdown of blacks versus others in the additional jurors to be called?

MR. RICHARDSON: Well, I didn't really ask for a numerical rating. I just asked her if there was any way she could tell whether or not the people she was calling were black or white. And my purpose, I think, was like I just said, was to see, you know, if there were going to be either a lot or any or none at all of black people.

THE COURT: Yes.

MR. HADDAD: You're an officer of this Court; there is no question about that.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And your job as prosecutor is to provide defendants a fair trial; not only get a conviction. Do you agree with that?

MR. RICHARDSON: Sure.

MR. HADDAD: And would you agree you were out of peremptory challenges at the time the new panel was called, as were the defendants?

MR. RICHARDSON: We would have to check the record on that.

MR. HADDAD: Or you had one left.

MR. RICHARDSON: I was under the impression I had one left, but I'm not positive on that.

MR. HADDAD: You may have been out or had one challenge left.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And of the three black called, my recollection there were three; two were excused by the Court. Would that be fair, for cause, in the initial panel? Two were excused by the Court for cause; would that be correct?

MR. RICHARDSON: I don't know. I know that I excused one on my peremptories, and there were no other black people on the panel.

MR. HADDAD: Would you agree that after the rather extensive voir dire that the Judge conducted on all jurors, that that black juror that you exercised your peremptory challenge on had stated that she could be fair, she would not be influenced by the fact of Senator Porter and so forth?

MR. RICHARDSON: Yes, sir, that's correct.

MR. HADDAD: Okay. And would it be a fair statement and it may be that this question is so basic as to sound absurd, if you were out of—if you had one challenge left and a black were called and you exercised that challenge peremptorily and another black were called, you would be out of challenges.

MR. RICHARDSON: Yes, sir.

MR. HADDAD: And you would admit, would you not, that the evidence that at least perhaps not coming out at trial but through the discovery was such that these black defendants were selling dope to white people, according to Mustin. Mr. Ponder would sell his dope mainly to white people.

MR. RICHARDSON: No, I don't think that was the evidence at all.

MR. HADDAD: I said not what came out in trial. Would you agree that the statements of Mr. Mustin in this trial pursuant to discovery furnished by you as a result of the investigation conducted by Agent Linas—I can't say his last name—was such that the evidence would have been, had that testimony came out, that pursuant to those statements that Mr. Mustin made, Mr. Porter was selling his dope mainly to white people and keeping a large percentage of profits.

MR. PORTER: Ponder.

MR. HADDAD: Ponder, I'm sorry. Would you agree that those statements were made and that was in the discovery?

MR. RICHARDSON: How embarrassing. I haven't even reviewed those statements that Mustin made to the FBI. I do know that there was some statement somewhere that Mike Mustin said Sam Ponder sold his drugs to white people.

MR. HADDAD: And also Gregory Holley?

MR. RICHARDSON: If you say so, I assume that's correct.

MR. HADDAD: Okay.

MR. RICHARDSON: Can I—Oh. I just want to say one other thing before I forget it, if I can. I want the record to be perfectly clear that I have no objection whatsoever to black people being on this trial or any other trial, and I think the record is very clear that I do not excuse many black people ever. I like to excuse them when Senator Porter is the opposing attorney.

MR. HADDAD: So you would agree, then, pursuant to your statements, that because of a trial experience you had, you feel a black lawyer of Mr. Porter's stature representing black defendants denies you what you think is a fair trial?

MR. RICHARDSON: I just think that Senator Porter has a very, very influential effect on jurors that are black.

MR. HADDAD: Do you want me to have the question read back?

MR. RICHARDSON: What was your question?

MR. HADDAD: Could you read it back, please?

(Reporter read pending question)

MR. RICHARDSON: That's hard to answer. I just can't answer it yes or no.

MR. PRICE: I would imagine that Senator Porter, when he is trying cases in Muskogee, Oklahoma against Gene Stipe would tend to dismiss people from McAlestar. Let me just give that analogy to you. I imagine if you were trying a civil case in Muskogee, Oklahoma, and Senator Gene Stipe has such a tremendous reputation and consideration in places like McAlester, Oklahoma, you'd

have a tendency to dismiss people that from McAlester area that came up in a Muskogee Federal Court jury.

What I'm saying is, that let's face it, you may not be talking about race here. You may be talking about you're a state senator that represents basically the entire black community of Oklahoma City, highly respected, highly well-thought-of, and have probably about ninety-eight percent name recognition and probably about something similar to that in terms of the respect of that whole area of Oklahoma City.

I just think in fairness to Ted Richardson, that think of that thought would come to your mind. I imagine that that would be something that would be going through your mind if you were trying a case in places like Muskogee in the same way.

MR. PORTER: Well, the only thing, that I've tried many jury cases, both civil and criminal, where black citizens even from Oklahoma City have been on the jury and I have not—I wish that—I wish that that were always true. I've probably lost as many with black citizens on the jury that I've won.

It's a very difficult thing, you know. I'm not a ninety-eight percent hero, particularly in the minds of some blacks; and I suspect that's obvious by the mere fact that in the twenty-one years I've been in the senate, I have had opposition from the black community every time but one, so I'm certainly not politically that much of a hero.

Again, before I take any position on this—And I understand Ted's right and I think he has a very fundamental right to respond to it if he wanted to prior to any fixed opinions being developed. Again, seeing that it's been laid out, he's responded, and I would certainly like to have an opportunity to I guess confer with co-counsel and see how it would be best to approach this matter. I for one—

MR. HADDAD: I have one last question, but I guess—

THE COURT: Let's let Mr. Porter finish.

MR. HADDAD: Okay.

MR. PORTER: It is a delicate matter, and it's just something that I suspect that I would want a little time to visit with Fred on to see if we could not at least be in agreement on whatever was going to take place.

MR. HADDAD: I hadn't finished. I had one more question when Bill interrupted me.

MR. PRICE: I'm sorry.

MR. HADDAD: That's okay. Would you agree that had either myself or Mr. Porter went to the jury clerk and requested, if that be what happened, that all black people be called, that that would be a commission of attempted obstruction of justice?

MR. RICHARDSON: I would think it would be very improper.

MR. HADDAD: Would you agree it would be attempted obstruction of justice by invading the jury process or attempting to so do?

MR. RICHARDSON: I hate to sound so ignorant. I don't know exactly what it would be.

MR. HADDAD: Okay.

MR. RICHARDSON: I just think it would be very improper if you all asked Bea only to call black jurors.

MR. HADDAD: Okay.

THE COURT: Let me suggest, before we take a break and let everyone confer, that the alternatives as I see it are as follows. Number one, Mrs. Bea Slater, the jury clerk, is available for inquiry in chambers or otherwise in an evidentiary hearing in the courtroom, and she will remain available to us and we'll proceed as appropriate after you've conferred.

The inquiry that I made of Bea Slater on Monday was on the record. The time has not permitted a transcript to be typed of that, but I will be glad to share and I have attempted to share with you what she told me. And I will tell you further that, and you will see this when you see the transcript of what her answers were, that she felt

rushed, as she certainly should have because she was asked to get fifteen additional jurors very quickly so she didn't delay our trial. That her memory was not specific as to the words said, and in fact she did not promptly report it to the court clerk and did so only upon reflection in feeling that it was something, upon reflection, that she should report. So the words as related to me by Mrs. Slater and the account of the conversation by Mr. Richardson are inconsistent, and I suggest that Mrs. Slater should be inquired of for your satisfaction, but we can do that in any form that you feel is appropriate.

But why don't we take a few minutes and let all of you confer, and then I'm available to you when you're ready to reconvene.

(Following proceedings held in Judge Thompson's chambers at 12:15 p.m. on June 20, 1984)

THE COURT: After having the opportunity to confer, defense counsel now have suggested and it is agreeable with everyone that the court reporter will read to all counsel the record of the inquiry that I made of Mrs. Bea Slater on Monday of this week, and all are further in agreement that my presence is not necessary for that to be done, and then we'll reconvene and proceed after they have had the benefit of hearing that record.

MR. HADDAD: The Court's going to lunch; right?

THE COURT: Yes. Now.

MR. HADDAD: Okay. I was going to say you said to reconvene about 1:30. Maybe I'll grab a sandwich, too, and make some phone calls.

THE COURT: Do you want to have it read to you now?

MR. HADDAD: Yeah, but I'm saying you said we would reconvene and it was at 1:30.

THE COURT: Yes. 1:30 is agreeable to me if it's agreeable to you.

(Court reporter read entire in-chambers conference which was held on Monday, June 20, 1984)

(Following proceedings held in Judge Thompson's chambers at 1:30 p.m. on June 19, 1984)

THE COURT: Gentlemen, you have now had read back to you my inquiry of Mrs. Bea Slater that I conducted on Monday, have you not?

MR. PORTER: Yes, sir.

MR. HADDAD: Yes.

MR. PRICE: Yes.

THE COURT: You've also had the opportunity to consult among yourselves and with each other.

MR. PORTER: Yes, sir.

MR. HADDAD: I think we need a hearing.

MR. PRICE: Let me inquire. Can we have the hearing initially here in chambers?

MR. HADDAD: Yes, sir.

MR. PRICE: With Bea Slater?

THE COURT: With Ms. Slater.

MR. HADDAD: Yes. And Mr. Bonsiero.

THE COURT: Bonsiero is the court clerk, whose role in this, I might add, was to report to me what his subordinate Mrs. Slater had reported to him.

MR. HADDAD: Uh-huh.

THE COURT: And they are both available, and we can take them in any order of your choosing.

MR. PRICE: I don't know.

MR. HADDAD: Take the gentleman first, I guess, and the lady second.

MR. PRICE: Of course, really what he's just saying is the hearsay recitation.

MR. HADDAD: It's only a hearing. Hearsay can come in. I'd like to have him here.

THE COURT: Is that agreeable? I'll call for him first.

MR. PRICE: That's fine.

THE COURT: And then we'll have her come down.

MR. HADDAD: My clients would like to attend, if that's all right with the Court.

THE COURT: I'm not going to exclude them, but I suggest we relocate in the library.

MR. HADDAD: Okay.

THE COURT: And of course, that means we'll have to have the marshals present as well, so we'll make those arrangements.

(Following proceedings held in Judge Thompson's library at 2:00 p.m. on June 19, 1984)

THE COURT: We are meeting in chambers with both defendants personally present, with each of their counsel, with Mr. Richardson and Mr. Price, and with the deputies assigned to the trial, together with myself and the court reporter. And we are meeting for the purpose of making Mr. Bonsiero available to answer any questions regarding what he knows about the issue in question.

And I might, as a starting point, recite that after the trial had recessed for the weekend on last Friday afternoon, Mr. Bonsiero asked to see me, came to my office and related to me information given him by Mrs. Bea Slater, the jury clerk. And Mr. Bonsiero's information to me, I have already given on the record here, so I won't burden the record by further describing it, particularly since he's here to give that answer personally.

But as an opening inquiry, did you come to my office about 5:00 after the trial had recessed last Friday, upon receipt of Mrs. Slater's report to you that she had received a call from Mr. Richardson, and is that not so?

MR. BONSIERO: Yes, sir, it's true.

THE COURT: Now, for the benefit of everyone here and for the benefit of the record, would you as closely as you can recall it, state all the facts, starting with your first contact from Mrs. Slater and then through the conclusion of our conversation.

MR. HADDAD: Excuse me, Your Honor. I don't know, but for purposes of the record, does he need to be under oath?

THE COURT: I think it perhaps would be better. So would you raise your right hand and be sworn.

MR. HADDAD: Thank you, Your Honor.

FRANCIS C. BONSIERO

being first duty sworn, was examined and testified as follows:

THE WITNESS: At about as near as I can recall, about 4:00 on Friday afternoon, Bea Slater came into my office, my jury clerk, and she was obviously distraught, and she said, "I have something to tell you."

I said, "Well, by all means, please do."

And she said, "You know about the Thompson trial that they are having down there today."

And I said, "Yeah. I know of it."

She said, "Well, we tried to get a jury yesterday." I think she said that we sent down, originally sent down thirty jurors and they couldn't get a jury panel—or couldn't get the twelve and the alternates selected.

"So I was under orders from Irene, who is under orders from Judge Thompson to get—call in additional juries—jurors."

And this was some time around, oh, I would say, 11:45 on Thursday that she got notification that she would need more jurors. So she was scrambling like the dickens to get the additional jurors, and about noon she told me she got a call. This is Thursday still. At noon she got a call from a person who identified himself as Ted Richardson, and she said that Ted said, "Bea"—Let me recall this now. Said, "Bea, uh, we'd like not"—words to the effect that, "Uh, we'd like to have as few blacks as possible on this jury."

And Bea made the statement that, "Ted, I'm just scrambling like hell to get what I can, and I just have to get however many jurors however possible I can get them," as if to—you know, not to give any—the statement not accommodating the request.

So I asked Bea, I said, "Now, Bea that could be, you know, there could be some difficulty in his request." I said, "Are you sure that's what he asked?

And she said, "Yeah. He said he would like to have—not for us not to get any blacks."

And I said, "Well," again she asked me, displaying her anxiety over this. "Do you think we have to do anything about this?"

And I said, "You're damn right." I said, "We can't sit on this. This thing may be bigger than both of us. I'm going to have to go to the Trial Judge on this." Or I may have said, "I'm going to have to go to the Chief Judge," but I had second thoughts on that and I said, "I'm going to have to go to the Trial Judge on this."

And again, this was around 4:00 in the afternoon and I came down here immediately with the intent of seeing you, but I knew that you were in Court; and therefore, I left word with Sharon and said, "I absolutely have to see Judge Thompson before he leaves today."

At 5:00 you called me or she called me, and I related the story to you in chambers.

THE COURT: Okay. Who wants to make first inquiry?

MR. PRICE: Why don't you all.

MR. HADDAD: Okay.

DIRECT EXAMINATION

BY MR. HADDAD:

Q Did Mrs. Slater appear that she could have been misinterpreting what Mr. Richardson had said?

A I asked her a couple different times, "Now, are you sure this is what he said?"

She said, "Frank, you know, I was in—running around just trying to get as many jurors as possible, but I'm—I feel certain that that was the request, that, you know, he had asked to—not to get any blacks on the jury."

Q All right. And to your knowledge, has a U.S. Attorney or an Assistant U.S. Attorney ever called your office in any regard relative to the make up or composure of prospective juror panels?

A That's the first time that that came to my attention, anything that type—that type of incident.

Q And how long have you been the clerk?

A I have been acting clerk—I've been clerk since May and acting clerk since November of last year.

Q Okay. Now, did you inquire of Mrs. Slater why she waited a day to tell you?

A I was a little bit concerned about that, yes. She was—she really didn't know. I suppose she had a tiger by the tail and she didn't know what to do with it. As a matter of fact, she went home that evening, and she related this story to me, and her husband said, "Now, look. You have to tell your boss, and if you don't tell him, I will."

And you know, so she did come to me the next day. But she just—I think she wanted to, which I would suspect would be anyone's natural, their first response to it is perhaps to avoid a somewhat thorny problem.

Q So that—

A Now, I'm just—This is me talking. This isn't her.

Q I understand that. I'm not trying to put words in your mouth at all.

A Okay.

Q What I'm trying to get is she related to you that she was in essence troubled by this and related what happened with her husband.

A Well, she related the incident to her husband, and her husband said, "Now, look." You know, he saw perhaps the seriousness of it all, and he said, "You're going to have to go tell your boss," so—

Q So that at least at any rate, your way of thinking, she knew what she had heard in her own mind.

A Oh, yes.

Q Or else she wouldn't have related it.

A Oh, yeah, there is no question about it. No question about it.

MR. HADDAD: I have nothing else.

THE COURT: Mr. Porter?

MR. PRICE: Frank, let me.

THE COURT: Mr. Porter, did you wish—

MR. PORTER: No, sir.

THE COURT: Go ahead, Mr. Price.

MR. PRICE: I'm sorry.

CROSS-EXAMINATION

BY MR. PRICE:

Q At the time she talked to you was what time the next day?

A I'm going to have to say it was somewhere around —between 3:30 and 4:00.

Q Of the day after the incident?

A Yes. She came and sought me out on Friday afternoon, 3:30 or 4:00.

Q You relate basically that she said to you, "We would like as few blacks as possible on the jury panel."

A I'm paraphrasing the—

Q That's what it sounded like she was saying that Ted Richardson said to her; is that correct? Is that your understanding?

A I think. I—I think—Yes, and I think the more accurate quote was, "Don't get any blacks on the jury," or, "Don't get any black jurors."

Q The way you first related it was, you know, "We would like as few blacks as possible on the jury panel," and I, at least in listening to you, I was interpreting you saying that that's what Ted Richardson told to her and she interpreted that as meaning, and it would be very interpretable as meaning, "Don't put any blacks on the jury."

A All right.

Q Could it have been either way, the way it was related to you, could it have been that she was saying to

you that, "Ted Richardson said we would like as few blacks as possible on the jury panel, and I feel he's asking me not to put blacks on the jury panel." Is that certainly consistent with what you heard?

A Yeah.

Q Or it could be either way?

A But she has told me since that time, when we've talked about it—Okay, she and I have talked about it, that the question or the statement was, "Don't get any blacks on the jury."

Q Okay.

A That was—that was the one thing that I picked up on. That was the one statement.

Q Did you ask her, did you quiz her about this? In other words, did this affect her at all in the way she carried herself out in doing the jury?

A Absolutely not. As a matter of fact, as a matter of actual fact, I think the—after the lunch break, when they went back into Judge Thompson's court, I think of the—however many jurors there were, there was at least one black there.

Q The U.S. Attorney's office has no ability to order anybody to do anything like you're talking about. I mean, we've never tried to do that.

A I'm—

Q And we would have no—we have no—

A I'm certainly aware of that. I don't dispute that.

Q Again, we'll have to ask her whether it would have been misinterpreted. This was a phone call, as you understood it.

A It was a phone call, and in fact I wasn't there, but the phone right outside of my office where my secretary sits, and around that time, if I can recollect what Bea said to me, she said everything—she was, as I said, scrambling to get juries jurors, and people were at the counter; and she took this phone call right at that desk.

Q Did you ask whether she questioned him about, you know, "What are you talking about," or, "What are

you asking me to do," to make sure—you know, "I can't do that," or anything like that? Did you—

A She said—her response to that was, and now at what particular time it was, I don't remember. But her response to the entire statement was, "I'm just getting my feet on the ground, Ted, and I've got to get the jurors from wherever I can." Again, paraphrasing but that's—

Q It wasn't any response like, "You're asking me to do something improper," or anything like that that would normally alert someone that was the—

A To my knowledge, no, there was no response like that that she gave.

MR. PRICE: Ted?

MR. RICHARDSON: No.

MR. HADDAD: May I ask one more question?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. HADDAD:

Q Sir, I don't know how it works here. Would it be fair to say that Mrs. Slater, the deputy clerk, selects the jurors, who would be called in, by looking at her cards or getting cards and calling certain people?

A She does—She's given an order by the—well, let me say this. She consults with the courtroom deputy. In this case the courtroom deputy for Judge Thompson. She'll consult with any courtroom deputy, and the most pressing question is how many jurors do we need? Okay. And she'll call them in, irrespective of whatever.

Q I understand that. But what I'm asking you is if one were—And I'm not suggesting in the slightest that your clerk's office would ever do that, if one desired to exclude blacks from a potential panel of jurors, they could do that, could they not? Let's say that you were given an order to call in, out of the forty or fifty cards, you had to call on ten jurors, you could assure it would be a white jury, could you not?

A I suppose you could, only if you knew. We qualify a jury twelve times a year, once a month, okay? And if you knew of that—of the racial makeup on that very first day, you could; but without that information, you couldn't. It would be impossible.

RECROSS-EXAMINATION

BY MR. PRICE:

Q In the position she was in, Frank, at this time, it would be totally impossible for her to really know that. You would not be able to remit—you know, if she was being called to do this, how would she know at that point? All she would have is all the names of the people to be called. Is that basically where she would be at at that time?

A Although she would have the advantages I described here, she might know, being familiar and working with the jurors in this case if they were empaneled—I think they were empaneled on last Monday. She might know, you know, who is black and who is white.

Q Conceiveably?

A Conceiveably, yes. Yes.

Q But let me ask additionally. They just call the entire, as I understand it, when they get a call to call the number of jurors, what's the procedure? Is it just called at random? You pick out the jurors to come up next at random or how do they do that? I'm sorry. I still don't quite understand you.

A Well, what they will do is she'll try not to call a juror who—obviously, she can't call a juror who is at that time sitting on a trial. And she'll try and make every attempt, at least this is my understanding, she'll make every attempt to call jurors who have not sat on a trial yet.

Q So she just sits down and calls as many of the jurors that have not been called upon the previous time?

A Under normal circumstances, when she has enough time. However, in a case like this, and this is not a very atypical case. It happens occasionally. She'll get requests like this where she only has an hour or two to get people in here. Part of the makeup of the second jury that was called in, six of them were coming down off of the elevator. They had just been released by I believe Judge Brett or Judge West. I think it was Judge Brett. Had just been released by Judge Brett, so she got those six and I think she needed fifteen. So subsequently she would have had to have called in nine more.

Q You're talking about the jury clerk also would have to remember the names, much less the racial background of literally how many people? Maybe sixty or a hundred people?

A Exactly, yes. It would be a hard chore. There is no question about it.

Q It would be close to an impossibility?

A It certainly would.

Q So what was alleged to have been requested would have been, like I said, close to an impossibility. It would require a photographic memory and someone that had that kind of recollection of a huge number of people that that are coming in all the time.

A Conceiveably, yes. Yes.

MR. PORTER: I have one question.

REDIRECT EXAMINATION

BY MR. PORTER:

Q Let's say that she had to call in fifteen additional jurors and let's say that if she had to call those jurors and they were not in the building, then I take it that she has a phone and an address of each juror; is that right?

A Yes, sir.

Q And so if a juror lived in the northeast section of Oklahoma City, say a typical address, 2116 Northeast

18th, one could very easily say in all probability that is a black citizen if that is the northeast quadrant where the greater segment of the black population lives. That could be a possibility; is that not right?

A I suppose if a person is aware of the makeup.

Q Of the geographical—

A Yes.

Q And if one was conscientious about names that are common to blacks as opposed to other ethnic groups, to some extent, that would be a possibility that I can identify a person by name.

A I agree, but here again, you're talking about a jury clerk that's just—

Q Yes.

A Just concerned about meeting the demands of the Judge.

Q I understand. What I'm saying, let's say if she had honored his request and said, "I'm going to try to eliminate any blacks," then that would have been a possibility of eliminating somebody who might have been black, at least by name or by geographical area where they live.

A I suppose that—It could be.

MR. HADDAD: Can I follow that up?

REDIRECT EXAMINATION

BY MR. HADDAD:

Q And also, certain people, i.e., coming off of the other judge's trial, she could have kept those that were white and sent home those that were black.

A (Nods yes)

Q I mean, yes or no?

A Yes.

Q Okay.

A Yes.

THE COURT: Now, Mr. Bonsiero, if there are no other questions, let me conclude with these questions of you.

Was there anything at all said to you by Mrs. Slater or coming to your knowledge otherwise that suggests that there was any effort intended or made to select those additional jurors on the basis of race or otherwise?

THE WITNESS: No, sir. I'm personablly convinced that she got those jurors in here without any thought to that, Your Honor. That she just got them in, whoever she could get in here without—

THE COURT: We have two areas of concern here. One is the possibility of an improper contact by an Assistant U.S. Attorney with the jury clerk in its own right. Another question and concern is whether that contact had any effect or had any consequence on the makeup of the jury in this trial.

THE WITNESS: (Nods yes)

THE COURT: On the basis of my conversation with you on Friday and my conversation with Mrs. Slater on the following Monday, I concluded that all indications were that while an improvident contact may have been made and certainly required investigation, that there was no indication that that request had any effect whatever on the makeup of the jury in this trial. Am I correct in that?

THE WITNESS: Yes, sir.

THE COURT: Any other questions?

MR. PORTER: Yes. Judge for the record, I think you're absolutely correct because as I remember there were approximately 125 jurors; and of that makeup, I distinctly remember not one but three of those jurors being black.

THE COURT: Yes. I recall it that way, also.

MR. PORTER: Yes, sir.

THE COURT: All right. Thank you very much, and would you ask Mrs. Slater to come down to the hearing.

THE WITNESS: Yes, sir.

THE COURT: Just keep your seats.

(Recess held)

THE COURT: Gentlemen, this is Mrs. Beatrice Slater, our jury clerk. Mrs. Slater, would you stand, raise your right hand and be sworn.

I think the record is complete enough at this point that any preamble or preliminary comments are unnecessary, except to explain to you, Mrs. Slater, that we are all interested and concerned about the information that you related to Mr. Bonsiero initially and then at my request related to me regarding a telephone call from Mr. Richardson. The purpose of this hearing is for all parties and their counsel to have an opportunity to inquire of you about that. And I think that's enough said, and I'll invite counsel to inquire.

BEATRICE SLATER

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HADDAD:

Q We have had the benefit of hearing Ms. White read back your testimony that was recorded before the Honorable Judge Thompson, and let me ask you this. Can you relate again as best you can recall the circumstances and the phone calls?

A Well, I was asked, it was right around 12:00 noon when Judge Thompson recessed to get more jurors, and his courtroom deputy Irene Higginbotham came into my office and said that he needed about fifteen by 2:00 which gave me about two hours. I immediately ran into the clerk's office to get my assistant and I found out she had gone to lunch. The phone rang, they said, "Bea, telephone."

Q Okay. Now, excuse me. Somebody answered the phone other than yourself?

A Yes. Yes, sir. They answered the phone and apparently he asked for me and they said, "Bea, telephone." I took the—

Q Can I just stop you there one second. I don't mean to be interrupting you. Were you told then who was calling?

A No, I was not.

Q Okay.

A I answered the phone. I picked up the phone at—it was at Kathy's desk right outside of Mr. Bonsiero's office, and I suppose I said, "This is Bea." I usually do. Or, "This is the jury clerk," whatever, and he identified himself as Ted Richardson and said, "Are there any blacks on the jury?"

And as I remember, it shocked me. I think I said, "What?"

He said, "Don't get any blacks in," or something to that effect.

Actually at that point my mind was on getting jurors in here in two hours, and I think I answered him to the point as, "Well, I'll do what I can. I've got two hours to do this in," or more or less, you know, whatever.

And I went back to my office and started to calling. And just about that time, Judge Brett's jury had reached a verdict and I sent the ladies to lunch and I told them to be back by 2:00. There was six ladies on that jury. One of them was black and she came back.

Q How about the other six men on the jury—It is a six-man jury?

A Six women.

Q I mean, but a six-person jury.

A Yes, uh-huh. Yes, uh-huh. It was a civil case.

Q Okay. All right. Now, the first word you heard from him, Mr. Richardson, "Are there any blacks on that jury?"

A He identified hisself and said, yes—I mean, yes, this is what he said. "Are there any blacks on the jury," or something to that effect.

Q And his next words were, "Don't get any blacks."

A "Don't get any blacks in on it."

Q Are you positive of that?

A I cannot be positive word for word, but it was—that was the nitty-gritty of it. I repeat: Judge Thompson had issued an order for fifteen jurors in two hours, and that means call them and get them in in two hours, and that's where sort of my mind had blocked out.

Q Was there any doubt in your mind that what he was telling you was that he didn't want blacks on the jury?

A That's the impression I got. I don't take it as a threat. I take it as a request or something.

MR. RICHARDSON: I'm sorry. I just didn't hear the tail end of it.

MR. HADDAD: Took it as a request.

MR. RICHARDSON: A request.

Q (By Mr. Haddad) Now, could the words have been, "How many blacks are on that jury," the first words?

A I don't know. Now, as I remember it, he said, "Are there any blacks?"

Q Okay. But the second—

A And I suppose he meant, straightening my mind out since then, I suppose he meant—Well, on Monday before, we had qualified over a hundred jurors, and this bunch of jurors come out of that pool.

Q And the second thing he said was he didn't want any blacks on that jury.

A "Don't get any in on the jury."

Q There is no doubt in your mind about that part.

A Well, if it's not word for word, it's what he—what I took that he meant.

MR. HADDAD: Okay. I don't have any. Do you, Mr. Porter?

MR. PORTER: No.

THE COURT: Mr. Price or Mr. Richardson?

MR. RICHARDSON: Well, is it okay if I ask you a few questions?

THE COURT: Of course.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q Mrs. Slater, of course I'm Ted Richardson and I know that it's probably uncomfortable, and I am the person, obviously, when you say I identified myself that was calling, that was me. I think that was clear, and I just want to touch base with you.

As I understood your testimony, that when I called, I identified myself and said either Bea or Miss Slater, are there any blacks on the jury, or can you tell me how many blacks are going to be jurors? Is that correct?

A I—if I remember right, you said, "Are there any blacks on the jury?"

Q And I think my question is: I wasn't even aware that there was a jury going on. I mean, I obviously knew that you had been requested to call in some other jurors, and so would there be any problem with the idea being that my question referred to not any particular jury from Judge West or Judge Brett, but just were there any black jurors there?

A I can't—

Q Or that you were calling.

A I can't answer that. I mean, I got the call and as I repeat and have said many times, my mind was—Well, in my job you definitely have to take priorities, and Judge Thompson had issued an order for fifteen jurors and that's where my mind was locked, and I assume that's what you were talking about.

Q Okay. And then, I think that when Mr. Bonsiero testified just a few moments ago, he said that as he recalled it, that you related that I said something along the lines, "We would like to have as few black jurors as possible in this trial involving Mr. Brown and Mr. Porter." Does that kind of ring true?

A Well, what I remember your saying was, "Don't get any blacks on this jury."

Q Okay. Well—

A Now, I could be wrong in a few words on this because, again, my mind was locked on this—well, fifteen—or two hours is not very long to get fifteen people, to call them and get them in here, locate them and get them in here. No offense, Judge Thompson, but I mean, you understand.

Q Yes, ma'am.

A And that's where my mind was locked because I realized that they need to move the trial on.

Q Yes, ma'am. I think that comes down to the whole point of the hearing. Is that what you were interpreting I was saying or are you saying to the Court, and I think that is the exact issue that is very much a concern to the Court, if I said to you, it seems to me totally improper and totally the type of thing that you would get fired or go to jail on if I said to you, "Don't get any black jurors."

A Well—

Q And my question is, are you telling the Judge what I said or that's what you interpreted what I said, "Are there any black jurors on the jury panel," or when I said in reference to the trial of these men, "We would like to have as few black jurors as possible."

A Well, as I remember it, you said, "Don't get any black jurors, blacks on this jury," or something to that effect. "Don't get any blacks on this jury."

Q Or something to that effect?

A Something to that effect. And like I say, you were the attorney in there and my mind just locked on that case. Maybe I was mistaken, but that's where my mind locked.

MR. RICHARDSON: Judge, that's all I've got.

THE COURT: Mr. Price?

CROSS-EXAMINATION

BY MR. PRICE:

Q Bea, obviously it would, being in your position, you know, even if you interpreted the remarks as being any

reference to the calling of jurors whatsoever, it would be your responsibility obviously to bring it to somebody's attention, as you did.

But as I understand what you just said, there was basically a difference in this thing between two statements, and they are not really far apart and we're trying to get at the sureness, the truth one way or the other, what Ted Richardson says he did. And it's probably something that shouldn't be done, but it's of a totally different character than the other conduct. Is that he basically said, "We would like as few blacks on the jury panel as possible," and that, "How many black jurors are there," or something to that effect.

A Well—

Q That could be very easily interpreted as told are there—it being interpreted as "Don't put any blacks on the jury," as such. What I'm trying to do—but that's a very critical difference because it means whether he's doing a criminal type of thing or not. You're saying you're not sure whether it was that strong or not; is that what you're saying here?

A I definitely remember that he said how many blacks —or, "Are there any blacks on the jury?"

Q So without any doubt, you're sure of that; right?

A Yes.

Q And—

A He identified hisself and said that.

Q We all agree a hundred percent on that.

A And the next thing that you are asking me, I remember his saying, "Don't get any blacks in on this jury."

Q Could it have been very possible, and you're talking about a phone call and you're talking about a busy office and you're talking about—is it very possible, and it sounds like from the way you're expressing it, that his version of, "We would like as few blacks as possible on the jury panel," is it possible that that was what was said?

A I don't remember it that way.

Q Let me ask you. Is there a real possibility that that could have been what was said?

A I suppose it's possible, but I don't remember it that way. I remember him saying, "Don't get any blacks on this jury." It's possible he could have said it the other way, but I don't remember it that way.

Q That last remark, as I said, could be interpreted the other way, too, couldn't it?

A Yes. It could be but—

Q Yes. Did you ask him to clarify? In other words—

A No, I didn't.

Q In other words, or say some kind of words that would indicate to him that it was being interpreted in that fashion? In other words, was there some statement from him that—I mean from you that, "I can't do that. That's wrong," or something like that?

A No, I did not. I do not remember saying that, Mr. Price. What I mostly remember saying is something about I had to do the best I could. I didn't even have my feet on the ground yet, meaning that Judge Thompson had just issued the order, I had two hours to do it and I had to get to work; and the fact of the matter is when you're—I was going to get anywho I could. You know what I mean. I just—I had to get a jury in.

Q So you weren't able to really confront him with the phrase that—I mean with the thing and clarify it one way or the other.

A No, sir. I didn't take time. I got off of the phone so I could get to work.

Q If you had felt totally certain that he was saying, you know, "I'm calling down to order you to"—An assistant can't order you anyway, but, "I'm calling down to order you to keep blacks off this jury," if you felt totally certain of that, a hundred percent that that's exactly what he means, not, "My goodness, that seems like what he was asking me to do," wouldn't you have been immediately inclined to go immediately to Frank Bonsiero?

A I probably would have, but I didn't get it that way. What I—the way I took it, that he was more or less asking a favor. It was not a command or an order. It was a—a favor. That's—Well, actually, when I got this jury in, to be quite frank about it, I didn't think about it anymore because I was calling people, I was working, and I finally went to lunch at 2:30 and that's when I really realized what had happened. And I guess I was in a state of shock because it pondered around in my mind for about 24 hours, and Friday afternoon I felt like I should go in and report it, and that's when I told Mr. Bonsiero.

Q And again, I'm not saying there is anything wrong. It's right in reporting it, regardless of whether you're positive about something like that or not, but in your statement before, you made these statements: "You can't be positive. I could be wrong," and it's real critical that it—Is it certainly you could be wrong and you can't be totally positive that he said precisely those kinds of words, "Don't put any blacks on the jury."

A I—That is what I remember his saying.

Q That is what you were making reference to, "I can't be positive and I could be wrong."

A Well, in a situation like that, the only thing I can do is tell it as near as I can remember it because, again, my mind was on what I should be doing.

Q And so therefore, because your mind was on these other things, you really can't be a hundred percent sure.

A No, I couldn't be a hundred percent sure, but that's the way I remembered.

MR. HADDAD: May I?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. HADDAD:

Q The words were of sufficient import to you that when it dawned on you what he said, you were shocked by it.

A Yes, I was.

Q Okay. And there is no question in your mind that he was asking you a favor to keep blacks off that jury.

A That is the way I took it.

Q Okay. And how long have you been working here at the U.S. Courthouse?

A I've had this job about five and a half years.

Q Has anybody ever called you up in the five and a half years you've been in here to do a favor like that?

A I can't remember it.

Q It would stick out in your mind again if it happened; correct?

A Yes, it would

Q All right. Now, do you know how many blacks were qualified to be called in and serve as jurors?

A This time?

Q Yeah.

A No, I don't. Out of the fifteen we got in, there was three in it.

Q And were they called in—one was already on Judge Brett's jury.

A One was on Judge Brett's, and then I called two in.

Q Okay.

A And to be quite frank about that, I did not even know—realize that because let me make this clear. We had qualified these people, this panel of juries on Monday before, which there was about a hundred and twenty of them. I called the role; but part of the time when they answered, I didn't even look up, and I hadn't worked with these people long enough to know—

Q Uh-huh.

A —what color they were by name.

Q I'm not even suggesting any impropriety on your part.

A I know, but I—That would clarify that.

Q I understand. I understand that. You remarked to Ted, and please don't take this wrong. I'm just going by what you said. When Mr. Richardson asked you to do

that, you would see what you could do or something like that, but my feet are to the fire now.

A I said I didn't have my feet on the ground yet. I meant that I had to get to work and get fifteen people in here, frankly, regardless of what color they are, because Judge Thompson had ordered fifteen people in two hours.

MR. HADDAD: Okay. I don't have anything else. Senator?

MR. PORTER: (Nods no)

THE COURT: Bea, there are two primary concerns or questions to be dealt with here. One is the propriety or impropriety of Mr. Richardson's phone call to you in its own sake, and that would have to be looked at and dealt with by someone. The other is whether his comments to you, whatever they were, resulted in any effort on your part to provide additional jurors for our trial of any racial basis.

THE WITNESS: No. No. It did not. Again, I say I got fifteen people the quickest way I could. Again, I will say that what he—what had happened, really, I didn't have time for it to enter my mind and pry on my mind because I had to get fifteen people in here regardless of the color, and I might again say I've never—or I might say I've never gone by color. I've just gotten people that I felt were qualified.

THE COURT: Is there anything at all that happened in the jury selection process of this case, including your providing us with jurors from which to make those collections, that was any different because of Mr. Richardson's phone call to you?

THE WITNESS: No, sir.

THE COURT: And may I safely conclude, then, that our jury in this case and all the jurors from whom we had to draw, were provided completely free of any selection effort on your part pursuant to Mr. Richardson's request or otherwise?

THE WITNESS: Right.

THE COURT: Based on race?

THE WITNESS: That's right.

THE COURT: Do you know of anything that has been said or that has been done that would cause anybody to question the truthfulness or accuracy of that answer?

THE WITNESS: As far as my part is concerned, no.

THE COURT: Well, do you know of anything that was said or done—

THE WITNESS: No.

THE COURT: —on anyone's part—

THE WITNESS: No, I do not.

THE COURT: —that would cause that answer to change?

THE WITNESS: No.

THE COURT: Anything else?

MR. PORTER: No, sir.

THE COURT: Thank you, Bea. I'd appreciate it if you would hold this in confidence for the time being.

THE WITNESS: I will do that. Thank you.

THE COURT: Based on what we've heard, and I think we have been obviously heard from everyone who had any knowledge of this at all, it is my belief that the jury in our case and the jury panel from which this present jury was selected was free of any kind of manipulation or selection on the basis of race or anything else irregular or improper. That is my conclusion. It there any challenge to that conclusion?

MR. PORTER: None by us.

MR. HADDAD: Not to the jury, no.

THE COURT: Therefore, I think there is no reason to disrupt the jury deliberation in the trial on the basis of the issue that we're dealing with; and that was my belief initially when I first inquired of Mr. Bonsiero and then of Mrs. Ritter. But I think now all parties have had a full opportunity to inquire, and I'm satisfied, and apparently the defendants are as well, that there is no basis for disrupting this trial.

That leaves, then, the first concern of the phone call from Mr. Richardson to Mrs. Ritter, and frankly, that falls into the category of possible prosecutorial misconduct or some other character of concern that is really outside of this case and outside, I think, of my responsibility in this case, and rests primarily now with Mr. Price and the Department of Justice and to whatever extent that the facts and circumstances suggest.

MR. HADDAD: Sir?

THE COURT: Yes.

MR. HADDAD: I didn't mean to imply that we don't think there was still prosecutorial misconduct in this trial and since this trial is infected, they should be granted a new trial if there is a conviction. We haven't had time to do certain things that we're looking into as well as the motions and memorandums and so forth.

I think our position is that as to the jury, because of this hearing, there is no need to disrupt the jury itself and for them to consider it, but I don't think we could foreclose this issue completely and say that there is not, taking this coupled with other things that has come to our attention, that ought not be amenable to a motion for new trial if there be a conviction and I'm not—I'm again not trying to be argumentative with the Court at all. I don't want the record to think we're waiving something and we consider this matter foreclosed as to this trial. Only as to the jury.

THE COURT: Of course. You have made a record in reference to the exercise of peremptory challenges and even to my excusing one or more jurors for cause in this case, and I understand that you have some objection to that, and I've already evaluated those objections and ruled on them, and they are available to you to reurge on a motion for new trial if there is a conviction and certainly to be reviewed on appeal. My concern, among others, under the circumstances is whether the telephone call resulted in any tainting of our jury panel, and I conclude, and I think you do, that it did not.

Now, if you wish to couple what has happened with your other objections to urge something of that kind on a motion for new trial, of course you're not foreclosed from doing it, but I see no basis on which to interrupt the jury in their deliberations.

MR. HADDAD: The reason we're saying this is obviously if we had known it earlier, well, I don't know if we could have apprised the jury of it, but it certainly would have gone to the scope and character of the type of prosecution that we said was going on in this case. That is, the granting of immunities to witnesses and such, gross deals and all this stuff, as against Ponder and Brown. I think had the jury been apprised of the attempts, I would have called Miss—the lady as a witness in the trial. Absolutely without question, I would have called this lady as a witness in the trial if I had been apprised of that.

I think it goes to the character of the prosecution in this case. We have said and Mr. Richardson said in his final argument, "Do you think the government would do this? Would do that, would do the other thing," and honest to God, Judge, I

AMENDED PAGE 65

mean, I don't get shocked by anything anymore. I've been around too long, but I really believe that would have had a substantial impact on that jury; and it certainly, while it might not be evidence in the case, it certainly would be evidence of bias and some of these other things that certainly would have shown the character of the prosecution. At least I would have been able to make a record during the trial as to whether that person could have been produced as a witness to show that not only has Mr. Richardson had persons —you know, we have admitted perjurers in this case, we have this, we have that, we have the other thing, and it's been our theory of the defense that these people all sold—testified against these people to save themselves; and just to show the character of the prosecution when Mr. Richardson appears in there and says, "Our govern-

ment wouldn't do this or that or any of the other things," and here is at least the issue raised of whether he contacted the jury selector to deny these defendants--black--their race and a jury of their peers. I think it would have had a substantial impact on a jury.

We've had a jury out now six hours, seven hours deliberating. I think it would have had a substantial impact. It's obvious, because this is a pretty clear-cut case, that they are hung up on something, and something of what we said must have washed; that I think it could have had a substantial beneficial effect upon the defendants to have called this lady as a witness and put this before the jury. I think it could have properly been put before the jury in this case.

MR. PORTER: And if the conduct was improper in that extent before any evidence was taken, then it raises the high possibility that the conduct could have been improper in preparing the case for trial. For example, it was undisputed that Mr. Richardson, the FBI agent, Terry Holley and Mr. Mustin and another person met at the county jail over the weekend and had conversation.

Now, it goes to whether or not the misconduct on the part of--it certainly raises an inference if a prosecution was going to be that bold, that it also could raise the probability that they were bold enough to suggest to witnesses what to say. They visited with these witnesses, they had control of these witnesses, they have made deals with these witnesses, inference as to what to say and what not to say; and so when it comes to misconduct on the part of the prosecutor, the act of even calling that jury clerk was improper on his part.

And in furtherance of Fred's argument, part of his closing argument went to to the very essence, "If you think we've done anything wrong and we've tried to in any kind of way railroad these people to the penitentiary, then turn them loose," but that was part of his argument, knowing full well at the time that that argument was made, that at least he had picked up the telephone and called the clerk, the jury clerk before any evidence

was taken, to try and determine or possibly prohibit a black citizen from serving on the jury.

So it goes to misconduct prior to any evidence, even prior to the jury being selected, and that raises in my mind whether or not misconduct occurred. And I probed extensively on that about your visits with Mr. Richardson, who was present, when they took place, whether or not these witnesses were fudging or shading their testimony or giving their testimony in a light most favorable or suggestionable by the government, from the IRS agent to codefendants and unindicted co-conspirators who were involved in this case. And if that misconduct in fact occurred, there is not any question about it, it certainly occurred prior to the jury being selected.

I cannot conceive that if I had picked up a telephone and called that clerk and said that or even gave that impression to her, I shudder to think, as a defense lawyer, I just shudder to think what would have happened, had either Fred or myself called her and said, "Try to keep any blacks off" or—I mean, "any whites off. How many whites are you going to call? Try to get all black jurors." It goes to the very essence of tampering with the jury even before the jury is selected, and that kind of misconduct causes me, as a defense lawyer, to not believe that perhaps the prosecution in the preparation of this case and the production of their witnesses necessarily acted in all sense of fairness or in all sense of honesty.

And for that reason, I think that even though the jury was not picked as a result of any acceptance of that call, it is to the misconduct of the prosecutor in the case—in the case itself and hinges and taints the whole process of a fair and impartial jury, whether the jurors were twelve white or not and whether he had the ability to influence that or not because very—I don't question that he did not have any ability to choose that jury, but I question his role of misconduct as it relates to what every person is entitled to and that's a fair and impartial trial,

without tainting the trial where one is denied a fair trial.

MR. HADDAD: There is no way we could reopen the evidence and put Mrs. Slater on as a witness?

THE COURT: Not after six or seven hours of deliberation, I think not. But of course, once those issues are raised, the motion for a new trial, if there is a conviction, of course they will be considered.

(Courtroom Deputy Irene Higginbotham hands instrument to the Court)

THE COURT: And it is a very troublesome situation in many ways, and Mr. Richardson's explanation differs from Mrs. Slater's testimony in important ways.

And I'm advised that we do have verdicts on two of the counts, but the jury is not yet able to reach verdicts on the other two counts in a note that I've just been handed, and we'll deal with that in just a moment.

Just to close the record on this, Mr. Richardson, would you care—and I might also say that by letting the trial proceed to verdicts now of course does not foreclose and I did not mean to suggest that it should or would foreclose your raising anything on appeal relating to any of this, in combination or independently; and any such issues would be carefully evaluated if they are so raised. And neither does the concern or the further inquiry about this matter end with the verdict in this case or a ruling on a motion for new trial. It's a concern to all of us and a very unfortunate set of circumstances that I think, in fairness to everyone, needs to be given a full consideration. And just what form that further consideration should take is not clear to me at the moment, but more thought will be given to that.

Mr. Richardson, did you want to say anything further before we close the record on this hearing?

MR. RICHARDSON: Yes, I would like just to make a statement to the Court and to the defendants and of course to Mr. Price that, you know, looking back now,

my God, I regret making that phone call so much, and I don't think that we can avoid the statement that it clearly appears improvident today; and when I first heard, when we sat in there at noon, heard Ms. White read back what Mrs. Slater had said that I had said and what you had summarized, it was very clear that she said and you summarized it, exactly the words, I wrote it down, "Don't get any black jurors," and I was thinking to myself, "My God."

And I wrote it down and gave it to Mr. Price. You know, that's the type of statement that is clearly a crime and just absolutely unacceptable in anybody's book and would be thoroughly improper on behalf of me. I think that what we heard from Mr. Bonsiero and Bea today kind of, I hope, showed what I tried to tell the Court all along was not what I had said.

And from hearing Mr. Bonsiero testify as he recalled it that Bea had said that I said something along the lines, and he was of course just paraphrasing and he didn't hear the conversation, that he recalled her saying that I had said, "We would like to have as few black jurors as possible," which is exactly either I'm sure what I said or close to that, as if, you know, if the entire panel had been there originally, looking back, and I was hoping on the jury panel that heard the case, for the reasons I've stated in Mr. Porter's influence, I was hoping to get as few black of the jurors, not the ones come in but as few jurors as possible, and Mr. Bonsiero I think testified under oath that she said to him that I asked her, "Can you tell me how many blacks are coming in?" And then when Mrs. Slater testified, she said that after she thought about it she said, "Gosh, that appears so improper. I just have to report that to my boss or the Judge," and she did that and there was a question as to whether or not I said, "Don't get any blacks," or whether or not I was asking for a favor like, you know, "Do me a favor, Bea, and exclude people that are black."

And my point is simply this, Your Honor. That of course I didn't do either one. I didn't say, "Don't get any blacks," as if I was big enough to command her to do anything, and her original statement I think to you and to Mr. Bonsiero of that's what I had said, "Don't get any blacks," that's not the type of statement that you make if you're asking for some type of favor, and my point is simply this. That clearly such an improper phone call looking back, even inquiring as to what constituted the panel, I wish had never been made, but I think that the—or it appears obvious to me that the more she thought about it, that it did seem more and more improper, and that it just got blown out of proportion, and it all goes back I think what I told the Court originally before I had heard what she said or before I knew what Frank had said and I was under oath, and I said, "I called her and I remembered the discussions and identified myself and I simply asked Bea, 'Can you tell me how many black jurors are coming in?' "

And you know, I truly regret to both defense attorneys and most importantly to the office of the United States Attorney's office and more importantly to you, making the phone call because I think it appears, the appearance of these anyway is bad; but there was no attempt at all. And I'm saying I guess I'm still under oath, that I never told Bea, "Don't bring in these blacks." That's all I have to say.

THE COURT: My proposed answer to the jury is that they should reach verdicts on all counts and to please continue their deliberations. I think that's the appropriate response at this time. And if they continue to have difficulty, it could be handled a different way. Is that agreeable to both sides?

MR. HADDAD: Yes, sir.

MR. RICHARDSON: Yes, sir.

(Close of requested transcript of proceedings held on June 20, 1984)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2290

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WILLIE DAVIS BROWN,
a/k/a WILL BROWN, DEFENDANT-APPELLANT

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CR-84-43-T)

OPINION OF THE COURT

August 20, 1985

Before MOORE, BREITENSTEIN and DOYLE, Circuit Judges

DOYLE, Circuit Judge

Defendant-Appellant Willie Davis Brown here appeals from a conviction in the United States District Court for the Western District of Oklahoma. The charge was conspiracy to violate 21 U.S.C. 841 (a)(1) by possession with intent to distribute marijuana and cocaine. On appeal, defendant contends that:

(1) the district court erred in admitting similar fact evidence of a prior drug arrest under Fed.R.Evid. 404(b);

(2) the prosecutorial misconduct denied him the right to an impartial jury;

(3) the evidence of his participation in the conspiracy was insufficient to support the conviction; and

(4) the government's closing arguments were grounds for a mistrial.

The facts are as follows. The evidence at trial was largely from the testimony of co-conspirators. It established that defendant was the "Florida connection" in a drug distribution operation that transported marijuana from Florida to Oklahoma City, Oklahoma.

On November 24, 1981, police stopped a van and arrested its occupants, Keith Holley, Donald Weber and Terry Holley. They had failed to stop at an agricultural inspection station in the rural Florida countryside. A search of the van by the police produced 170 pounds of marijuana. They found the van to be registered to a co-conspirator, Sam Ponder, who was subsequently arrested. The police then stopped an Oldsmobile automobile that had been following the van. The occupants Greg Holley and Curtis Godwin were arrested after a search disclosed 100 pounds of marijuana. Testimony at trial established that co-conspirators Godwin and Weber had completed a large drug transaction at defendant's home in Florida. Godwin testified that he and Terry Holley bagged 57 pounds of marijuana at defendant's residence.

Further, co-conspirator Michael Mustin testified that he and Terry Holley had purchased 200 pounds of marijuana and half a pound of cocaine for the sum of $100,000 on a previous occasion.

During the trial, the government called Ralph Hernandez, a deputy sheriff from Broward County, Florida. Mr. Hernandez testified that he had arrested defendant on December 5, 1980, for possession of marijuana. The district judge gave the jury a limiting instruction on the

use of this testimony as being solely to establish a plan or motive. Fed.R.Evid. 404(b).

Only the defendant and Samuel Ponder were ultimately tried for the drug conspiracy. Ponder was represented by a prominent member of the Oklahoma State Senate who is a black man. Both the defendant and Ponder are also black. During the jury selection stage, the government excused all black venire members through preemptory challenges. Evidence during the second day of jury selection showed that Mr. Ted Richardson, the prosecutor, told the jury clerk that: "We would like to have as few black jurors as possible." The jury clerk told the district judge in chambers that she was not influenced by Richardson's request. The government preemptorily excused all prospective black jurors.

Defendant was convicted by a jury of the conspiracy on June 20, 1984, and was sentenced to five years imprisonment. He filed a motion for judgment of acquittal or alternatively for a new trial. Both of these were denied. We hold that the district court correctly denied these motions and affirm defendant's conviction.

First, we address defendant's contention that the district court erred in admitting the testimony of Deputy Sheriff Hernandez who had arrested the defendant at a Florida airport in 1980. The Deputy Sheriff testified that he observed the defendant hand over a brown suitcase to a Mr. Banks at the airport. The defendant was arrested after the suitcase was found to contain seventeen pounds of marijuana. The defendant asserts that this previous arrest was inconclusive and prejudiced him. We find no merit in this argument. We conclude that the district judge properly allowed evidence of the arrest to be admitted for propensity purposes. Fed.R.Evid. 404(b) explicitly allows "evidence of other crimes, wrongs or acts for purposes such as proof of motive, opportunity. intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The prior act at issue here was highly probative of defendant's scheme to possess and distribute

marijuana. The Tenth Circuit has long recognized the relevance of previous wrongs and crimes in the context of narcotics violations. We have little difficulty affirming this exception in the circumstances of the present case. *United States v. Nolan*, 551 F.2d 266 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977); *United States v. Leaphant*, 513 F.2d 1184 (10th Cir. 1975); *United States v. Pennick*, 500 F.2d 184 (10th Cir.), *cert. denied*, 419 U.S. 1051 (1974). The district judge eliminated any prejudice to the defendant by a limiting instruction to the jury that the evidence "was not to be considered as proof of the offense at trial, but for the limited purpose of determining motive, intent, knowledge, absence of mistake."

Second, we consider whether the government's use of preemptory challenges to exclude all potential black jurors, combined with the prosecutor's request to the jury clerk concerning the racial composition of the jury, violated the defendant's right to an impartial jury. Twenty years ago in *Swain v. Alabama*, 380 U.S. 202,221 (1965), the Supreme Court held that a violation of a defendant's right to equal protection under the Fourteenth Amendment could not be proved by the mere showing that the prosecutor has struck all black venire members from the jury panel in a single case. This Circuit has previously held that the appropriate analysis for a claim that a defendant's right to an impartial jury has been violated is the framework articulated in *Swain*. *United States v. Jenkins*, 701 F.2d 850, 860 (10th Cir. 1983). This Circuit therefore requires a showing of "systematic and intentional conduct on the part of the Government calculated to exclude Blacks from juries." *Id.* In the present case, there has been no showing that the prosecution was responsible for excluding blacks in "case after case." *Swain*, *supra* at 223. Because the defendant has not met this threshold requirement, we must conclude that he has no valid claim of an unconstitutional use of the preemptory challenge. *Jenkins*, *supra* at 860.

We find no merit in the defendant's argument that communications made by the prosecutor to the jury clerk

on the racial composition of the jury indicated a pattern of systematic exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. *See McCray v. Abrams*, 750 F.2d 1113, 1129 (2nd Cir. 1984), *cert. denied*, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Since we concluded that actions did not influence selection of the venire members, we must also conclude that the defendant suffered no prejudice because the district judge did not inform him of the incident.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question is one of fact for the jury to decide. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). *See also United States v. Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979). We must review the jury's decision in the light most favorable to the government, *United States v. Dickey, supra*, at 581; *United States v. Pilling*, 721 F.2d 286, 288-89 (10th Cir. 1983), to determine whether there was sufficient evidence to establish the defendant's participation in the conspiracy.

Our review of the evidence convinces us that the jury properly found that the defendant participated in the drug conspiracy as "the Florida connection." Trial testimony from Godwin and Webber placed defendant at the house where large drug transactions were completed. The other testimony indicates that co-conspirators Mustin and Terry Holley exchanged money for drugs on another occasion. We must conclude that there is an abundance of warranted conclusion that defendant participated in this conspiracy.

Fourth, we consider whether statements made by the prosecution during closing argument were prejudicial to the defendant. We must conclude that none of the statements constitute grounds for a mistrial. We find no errors in the district court's rulings and affirm on all grounds.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

August 28, 1985

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: No 84-2290; U.S.A. v. Willie Davis Brown

Opinion filed on August 20, 1985 by Honorable William E. Doyle.

Attached is a corrected page 6 to be substituted for page 6 in the original opinion which was filed on August 20, 1985.

Very truly yours,

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

HKP:kmh
enclosure

[CORRECTED PAGE 6 OF THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT]

No. 84-2290; U.S.A. v. Willie Davis Brown
Opinion filed on August 20, 1985
by Judge William E. Doyle

* * * *

exclusion of black jurors. Certainly the action of the government was improper. However, the government's action did not establish a prima facie constitutional violation. The jury clerk disregarded the government's request to limit the number of black venire members, and the government's action had no impact on the possibility that the jury would not represent a cross-section of the community. *See McCray v. Abrams*, 750 F.2d 1113, 1129 (2nd Cir. 1984), *cert. denied*, 105 S.Ct. 2318 (1985). Nevertheless this incident must be condemned even though it did not effect the outcome. The statement made by the district attorney was not shown to have played any part in the selection of the jury. Hence, although this statement was an ignorant one, it was not revealed to the jury and did not play any part in the outcome of the case.

We also find no merit in the defendant's argument that he was prejudiced because the district judge did not immediately inform him of the inappropriate contact made by the prosecution with the jury clerk concerning the race of venire members. Later the trial judge explained the matter to the jury and did so thoroughly. Since we conclude that the trial court was conscientious and did not influence selection of the venire members, we must also determine that the defendant suffered no prejudice from this source.

Third, we consider whether there was sufficient evidence to support defendant's conviction. Such a question

is one of fact for the jury to decide. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984). *See also United States v. Petersen*, 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied*, 447 U.S. 905

* * * *

IN THE UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

[Title Omitted in Printing]

**PETITION FOR REHEARING
OR TO CERTIFY CONFLICT**

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PETITION FOR REHEARING OR TO CERTIFY CONFLICT

COMES NOW the Appellant aforesaid by the undersigned counsel and makes this, his Petition for Rehearing in the above captioned matter, and states as follows:

FIRST: That this court has affirmed the rulings of the trial Court and in particular as to the prosecutor's exclusion by premptory challenge of "all black venire members" [opinion page 3].

SECOND: That no mention is made, and perhaps this Court overlooked the fact that during the hearing had by the trial Court regarding the prosecutor's remarks that the prosecutor stated under oath that he took into consideration the fact that the Defendants and counsel for one of the Defendant's was black as a result of a prior trial with the black counsel for the co Defendan, and that was his basis for excluding qualified blacks.

THIRD: That the prosecutor thus detailed his reasons for excluding blacks; which Appellant would urge this Court to consider as obviating the *Swain v. Alabama* 380 U.S. 202 (1965) requirement of "systematic and international conduct" [See also *United States v. Jenkins*, 701 F.2d 850 (10 Cir. 1983)].

FOURTH: That while the court has cited to *McCray v. Adams*, 750 F.2d 1113 (2 Cir. 1984), the Appellant respectfully suggests that this Court has created irreconcilable conflict with that circuit in its decisions to recede from the strict requirement of *Swain*, Supra.

FIFTH: That the Appellant would ask this Court to reconsider the fact that as mentioned hereinabove, the prosecutor announced that he excluded premptorily black jurors who stated they could be fair solely on the basis of race, and couple that with the natural inferences of his telephone call to the jury clerk and revisit the opinion authored under the narrow circumstances of this case.

SIXTH: That since the United States Supreme Court denied certiorari in *McCray*, supra, which Appellant respectfully suggests conflicts with the decision of this Court, the Appellant would respectfully request that this Court certify the opinion herein as conflicting therewith to facilitate review of the Constitutional issues involved in this matter.

WHEREFORE, the Appellant moves that an order be entered setting this matter for rehearinng upon the issue raised hereinabove.

SANDSTROM & HADDAD

By: /s/ Fred Haddad
FRED HADDAD

Dated: August 27, 1985

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—September 12, 1985

Before Honorable John P. Moore, Honorable Jean S. Breitenstein and Honorable William E. Doyle, Circuit Judges.

[Title Omitted in Printing]

ORDER

This matter comes on for consideration of appellant's petition for rehearing or to certify conflict filed in the captioned cause.

Upon consideration whereof, appellant's, Willie Davis Brown, petition for rehearing or to certify conflict is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 85-5731

WILLIE DAVIS BROWN, aka WILL BROWN, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: In cases pending on direct appeal, should the holding in *Batson v. Kentucky*, 476 U.S. —— (1986), be given retroactive effect? The case is set for oral argument in tandem with case No. 85-5221, *Griffith* v. *Kentucky*.

June 2, 1986

Supreme Court, U.S.
FILED
JUL 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, 476 U.S. ____ (1986), be given retroactive effect?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this matter is reported with the following citation: *United States* v. *Brown*, 770 F.2d 912 (10th Cir. 1985). That opinion, together with "corrected" Page 6 of said opinion and the Order denying rehearing, appear in the Joint Appendix at J.A. 53-60.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Tenth Circuit upon Petition for Rehearing was rendered on 12 September 1985. The Petition for Writ of Certiorari was filed on 10 October 1985. The Writ of Certiorari was granted on 2 June 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

> No person shall be . . . deprived of life, liberty, or property without due process of law.

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petitioner, WILLIE DAVIS BROWN, was named in one count of a multiple defendant, multiple count

Indictment returned and superseded by the grand jury in the Western District of Oklahoma (R. Vol. I, pp. 1-8, 14-25), in the Spring of 1984.

That one count charged Petitioner [asserted to be the "Florida Connection"] with being a member of a marijuana and cocaine distribution conspiracy that operated between Florida and Oklahoma City, Oklahoma (J.A. 54). This conspiracy operated, according to the Indictment, from November of 1981 through November of 1983 (R. Vol. I, pp. 14-25). All members of this conspiracy [indicted and unindicted] including those who testified, and from whom "the evidence at trial was largely [established]" were black (J.A. 54).

The Petitioner is black, his co-defendant at trial, Mr. Sam Ponder, is black, and trial counsel for Mr. Ponder, E. Melvin Porter, was "a prominent member of the Oklahoma State Senate, who is a black man" (J.A. 55).

Testimony against the Petitioner at trial, as noted, came largely from three testifying co-conspirators, Mr. Godwin, Mr. Webber, and Mr. Mustin, all of whom received some benefit from the government. The credibility of each of these witnesses was at issue, and this was more particularly so in the case of Mr. Godwin and Mr. Webber (Tr. VII pp. 439-489). The jury believed these men, convicted Petitioner, and said testimony survived review (J.A. 57, 58).

Jury selection for Mr. BROWN required two venire panels, in that challenges for cause and peremptory challenges had extinguished the first panel just prior to a luncheon recess.

The record illustrates (R. Vol. IV, pp. 11, 12-20, 21) that blacks were called upon each panel, and all blacks were

excluded, either by the Court for cause or by the prosecutor peremptorily (J.A. 55, 56).

The second jury panel contained three blacks, and after the prosecutor employed his last remaining peremptory challenge to strike the one black in the "box," the Petitioner, who had extinguished his allotted challenges, requested an additional "one or two challenges in an effort to see if we could seat some black jurors since there [were] several remaining black members of the community in the jury panel" (R. Vol. VI, p. 23). This was requested in conjunction with a particularized objection to the prosecution's selective use of its peremptory challenges to deny petitioner a representative jury by the exclusion of blacks (R. Vol. VI, pp. 20, 21). No blacks served on the jury.

Petitioner was apprised, during the second day of jury deliberations, of a certain communication that had occurred during jury selection the week before, between the Assistant United States Attorney, Ted Richardson, and the jury clerk, Beatrice Slater. The trial court had had an "in-chambers conference" with that jury clerk on 18 June 1984 (J.A. 2-9), after the court clerk, Mr. Bonsiero, had earlier advised the judge that the jury clerk, Ms. Slater, had, during the recess of jury selection and while Ms. Slater was seeking to find an additional panel in an attempt to seat a jury, received a telephone call from Mr. Richardson who "asked her not to include any black people in the additional jurors to be furnished" (J.A. 3). The Court then made inquiry of Ms. Slater and she related that:

> "It was around 12:00 Thursday noon when Mrs. Higgenbottom told me that you [Judge Thompson] needed additional jurors. I went to the clerk's office to get my assistant to help me call them. While in

there, I received this telephone call. He identified himself as Ted Richardson, and as best I remember, he said something about 'are there any blacks on the jury' and it did shock me. I said, 'What?'. He said, 'Don't bring any blacks in' something to that effect." (J.A. 6)

The jury clerk did not honor the request (J.A. 6-8)

After the trial was complete and the jury deliberating, the Court informed counsel of what occurred on 14, 15 and 18 June 1984, and the matter came on for a conference in Judge Thompson's chambers on 20 June 1984 (J.A. 10-52); the Court explained the situation and inquired as to the pleasure of counsel (J.A. 11). Counsel for Petitioner stated:

"Mr. HADDAD: Because of the challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both peremptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause, I particularly would request an evidentiary hearing, and I don't mean that to be . . . but I think for preservation of the record, particularly with this occurring which to me is somewhat overt racism in a selection of a jury with black defendants.

* * * I think we need an evidentiary hearing because some due process rights may have been violated." (J.A. 12).

A hearing was had with both the court clerk and the jury clerk testifying (J.A. 10-52). Ms. Slater reiterated the same testimony both on direct examination and upon cross-examination by Mr. Richardson and Mr. Bill Price, the United States Attorney for the Western District of Oklahoma. More cogent to the issues at bar, however,

were certain statements by Mr. Richardson. In one question to Ms. Slater, he offered the following:

> "Q. [By Mr. Richardson]: Okay. And then, I think that when Mr. Bonsiero testified just a few moments ago, he said that as he recalled it that you related that I said something along the lines 'We would like to have as few black jurors as possible in this trial involving Mr. Brown and Mr. Porter.' Does that kind of ring true?
>
> "A. Well, what I remember your saying was 'Don't get any blacks on this jury.'" (J.A. 38).

In his final remarks to the Court, Mr. Richardson, inter alia, stated:

> "And from hearing Mr. Bonsiero testify as he recalled it that Bea had said that I had said something along the lines, and he was of course just paraphrasing and he didn't hear the conversation, that he recalled her saying that I had said, 'We would like to have as few black jurors as possible,' which is exactly either I'm sure what I said or close to that * * *, I was hoping to get as few black of the jurors, not the ones come in but as few jurors as possible * * *." (J.A. 51).

Assistant United States Attorney Richardson also became a witness at this conference, and testified that while several black jurors were excused by the Court, he excused others peremptorily, relating a story regarding another trial he had with co-counsel Porter that had apparently split along racial lines (J.A. 15). [Senator Porter stated he had probably lost as many cases with black citizens as he had won (J.A. 20)]. While stating that it wasn't racist on his part to exclude those jurors, he continued:

> "And so all I'm telling the Court is that *I did take into consideration the fact that these people were black* and that almost everybody . . . I would think they

> would be an incompetent juror almost, if they were from this area and didn't know Senator Porter. And I had planned on excusing them if they indicated in any way that they either knew Melvin Porter or knew who he was." (J.A. 15) [Emphasis supplied].

But Mr. Richardson admitted, upon cross-examination, that one of the black jurors he excused, when questioned by the Court, stated that she could be fair and would not be influenced by Senator Porter (J.A. 18).

Due to the exigencies of the situation, it was agreed that any relief would be sought by post trial Motions; the Court stated:

> "You have made a record in reference to the exercise of peremptory challenges and even to my excusing one or more jurors for cause in this case, and I understand that you have some objection to that, and I've already evaluated those objections and ruled on them * * *." (J.A. 46).

Post trial Motions were thereafter made (R. Vol. I, pp. 44-48) and denied and appeal to the United States Court of Appeals for the Tenth Circuit followed.

The Appellate Court noted that it had considered the government's use of peremptory challenges to exclude potential black jurors, and the prosecutor's "improper" and "ignorant" actions and statements to the jury clerk (J.A. 57), but found that "there has been no showing [in the present case] that the prosecution was responsible for excluding blacks in 'case after case,'" citing to *Swain* v. *Alabama*, 380 U.S. 202 (1965). The decision continues:

> "Because the defendant has not met this threshold requirement we must conclude that he has no valid claim of any unconstitutional use of the peremptory challenge." citing to *United States* v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983). (J.A. 56)

A "Petition for Rehearing or to Certify Conflict" (J.A. 62-65) was filed, and denied by the Court of Appeals (J.A. 66) on 12 September 1985.

SUMMARY OF ARGUMENT

On 30 June 1986, this Court authored *Allen* v. *Hardy*, ___ U.S. ___ (1986), which concluded "that our decision in *Batson* [*Batson* v. *Kentucky*, 476 U.S. ___ (1986)] should not be applied retroactively on collateral review of convictions that became final before our opinion was announced."[1] [footnote of the Court omitted].

Petitioner's conviction was not final, and was indeed pending before this Court some six months prior to the decision in *Batson*. Thus, this case presents the unanswered question as to *Batson's* applicability to cases pending on direct appeal at the time the decision was announced.

Batson, the Court stated in *Allen*, "overruled that portion of *Swain*" [*Swain* v. *Alabama*, 380 U.S. 202 (1965)] that held that "although the use of peremptory challenges to strike black jurors on account of race violated the Equal Protection Clause, a defendant could not establish such a violation solely on proof of the prosecutor's action at his own trial, 380 U.S. at 220-226," thusly "changing the standard for proving unconstitutional abuse of peremptory challenges" [*Allen*, slip opinion at Page 3].

The Court in the rather recent cases of *United States* v. *Johnson*, 457 U.S. 537 (1982) and *Shea* v. *Louisiana*, ___ U.S. ___, 105 S.CT. 1065 (1985), has applied what has come to be called the Harlan approach, so named after the reasoning advanced by Justice Harlan concernig retroactivity [See: *Desist* v. *United States*, 394 U.S. 244 (1969) (dissenting opinion); *Mackey* v. *United States*, 401 U.S.

667 (1971) (separate opinion)], and held that decisions of the Court ["except in certain situations that would be clearly controlled by existing retroactivity precedents to the contrary," *Shea*, supra] at least concerning the Fourth and Fifth Amendment, would apply retroactively to all convictions not yet final at the time the decision was rendered. The Petitioner will urge the same applicability to Sixth Amendment rights by virtue of those decisions and the findings and holdings in *Batson* and other Sixth Amendment cases.

Allen further explained that the Court traditionally weighs three factors [See: *Solem* v. *Stumes*, 465 U.S. 638 (1984), quoting *Stovall* v. *Denno*, 388 U.S. 293, see also *Linkletter* v. *Walker*, 381 U.S. 618] in deciding the "extent to which a new constitutional rule of criminal procedure should be given retroactive effect."

While application of these criteria may well militate against application of *Batson* to habeas corpus review of final convictions, [See: *Solem* v. *Stumes*, supra], said criteria as will be analyzed ought not apply to a case on direct review, *United States* v. *Johnson*, supra; *Shea* v. *Louisiana*, supra. The Petitioner suggests that an analysis of prior precedents does not mandate nonretroactivity as the exclusion of jurors for racial reasons has indeed been condemned by prior decisions of this Court; only the standard and method of proof has changed.

Thus, the "purpose to be served by the new standards" is well defined.

The Petitioner will also argue that reliance upon the "old standards" may well have been misplaced and, as Justice Marshall opined, the Court "should at least give some thought as to whether that reliance should be deemed legitimate," *Allen*, slip opinion, dissent at Page 4.

This is particularly so when the facts of the instant case are considered. It was most certainly not, it is suggested, the intent of the *Swain* Court that a prosecutor could engage in such overt exclusion of blacks with impunity.

Retroactive application of the new standard to cases presently pending on direct appeal ought not "seriously disrupt the administration of justice" [*Allen*, slip opinion at Page 5], for this will not "require trial courts to hold hearings, often years after the conviction became final," [*Allen*, slip opinion at Page 5], but rather would apply the new standards to a narrowly defined group of cases with a properly preserved issue involving non-final convictions.

The Court should hold, therefore, that "Justice Harlan's reasoning—that principled decisionmaking and fairness to similarly situated Petitioners requires application of a new rule to all cases pending on direct appeal" [*Shea*, supra, 105 S.Ct. at 1070], and find that Petitioner is entitled to the benefit of the ruling in *Batson* v. *Kentucky*, supra.

ARGUMENT

THE DECISION OF THE COURT IN *BATSON* V. *KENTUCKY* OUGHT APPLY RETROACTIVELY TO CASES PENDING UPON DIRECT REVIEW.

The Court, since its decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), has had occasion to address the issue of retroactive application of new rulings of constitutional procedures, and the standards adopted thereby on numerous occasions. While a balancing test was established to inquire into the subject, the "outcome of the balancing test varied considerably," *Kirk* v. *United States*, ___ F.2d ___, District of Columbia Court of Appeals, Case No. 85-804, decided 5 June 1986.

Rather than trace the history of retroactivity and attempt to analyze and compare the numerous cases decided, Petitioner will address the rather recent decisions of the Court, as these relate to prior decisions upon the issue and to the case at bar.

The Court, in *Solem* v. *Stumes*, 465 U.S. 638 (1984) authored the following:

> "As a general rule, judicial decisions apply 'retroactively.' *Robinson* v. *Neil*, 409 U.S. 505 (1973). Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Nonetheless, retroactive application is not compelled, constitutionally or otherwise." [citations of the Court omitted].

The Court also noted that since *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court has "recognized that the interests of justice and the exigencies of the situation may argue against imposing a new constitutional decision retroactively. 381 U.S. at 628," *Solem*, supra.

Linkletter, and the cases that followed, established the "basic principles of retroactivity" in such cases, which principles implicate:

> "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U.S. 293, 297, quoted in *Solem*, supra, at 643.

The *Solem* Court began its holding of nonretroactive applicability of *Edwards* v. *Arizona*, 451 U.S. 477 (1981) [a Fifth Amendment, "*Miranda*" situation] by finding that "the *Edwards* rule has only a tangential relation to truthfinding at trial," for "'the question whether a constitutional rule of criminal procedure does or does not

enhance the reliability of the fact finding process at trial is necessarily a matter of degree' *Johnson* v. *New Jersey*, 384 U.S. 719 at 728, 729 (1966)" as quoted in *Solem*.

The Court then found that while *Edwards* was not "the sort of 'clear break' case that is almost automatically nonretroactive," it did, in fact, "establish a new rule"; *Solem*, supra, therefore, the reliance aspect as to the "old rule" was compelling "even though *Edwards* did not overrule a specific decision" *Solem*, supra, at 650.

Too, "retroactive application of *Edwards* would have a disruptive effect on the administration of justice," the Court concluded, opining that the number of cases where the holding might make a difference is "surely significant." *Edwards* was thus found to be nonretroactive to cases brought upon collateral review.

In the next term of Court retroactivity of *Edwards* was revisited as to those cases that were pending direct appeal, and, it was decided that the holding did indeed apply to cases upon direct review [*Shea* v. *Louisiana*, ___ U.S. ___, 105 S.Ct. 1065 (1985)]. The majority opinion stated that two of the Court's recent opinions "bear importantly upon this issue" *Shea*, 105 S.Ct. at 1068. The first case was *United States* v. *Johnson*, 457 U.S. 537, wherein, to quote the *Shea* majority:

> "The Court in Johnson found persuasive Justice Harlan's earlier reasoning that application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be unaffected and unprotected by the new rule." *Shea*, supra, at 1069, citations of the Court omitted.

Unless the announced rule is "so clearly a break with the past that prior precedents mandate nonretroactivity," *Shea*, supra, at 1069, new rules [in that instance involving the Fourth Amendment] would apply to "cases subject to direct review by the Court at the time the 'new' decision is handed down." *United States* v. *Johnson*, 457 U.S. at 548, quoted in *Shea* at 1069.

The Court then acknowledged its decision in *Solem* v. *Stumes*, supra, discussed the fact that that involved collateral review, and deemed *Edwards* was to benefit that person seeking direct review, Petitioner Kevin Michael Shea. In so doing, the Court, inter alia, stated, "[I]f the *Edwards* principle is not to be applied retroactively, the only way to dispense equal justice to Edwards and to Shea would be a rule that confined the *Edwards* principle to prospective application, unavailable even to Edwards himself." *Shea*, supra, at 1071.

On 30 April 1986, this Court authored its opinion in *Batson* v. *Kentucky*, 476 U.S. ____, 106 S.Ct. 1712 (1986), which analyzed an "interpretation of *Swain*" which placed upon defendants a "crippling burden of proof" to establish discriminatory employment of peremptory challenges and thereby, did in fact, "reject this evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case * * *" *Batson*, 106 S.Ct. 1712 at 1720.

Four members of the *Batson* Court [Chief Justice Burger and Justices White, Rhenquist, and O'Connor] stated that the ruling ought not have retroactive effect.[1]

---

[1] Chief Justice Burger cites, inter alia, to *State* v. *Neil*, 457 So.2d 481, at 488 (Fla. 1984) for the proposition, and language that retroactive application would be "a virtual impossibility." With all due respect to the Chief Justice, *State* v. *Neil*, supra [Florida's equivalent

First to broach this issue was Petitioner Earl Allen, who arrived before the Court through the vehicle of habeas corpus review and the denial of a request for a certificate of probable cause to obtain United States Circuit Court of Appeals review of a District Court's denial of his Petition for Writ of Habeas Corpus from a state court murder conviction, the murders having occurred in 1978. Conviction appears to have become final in 1981, *Allen* v. *Hardy*, ___ U.S. ___ (1986).

Allen urged that "the rule in *Batson* should be available to him as a ground for relief on remand," *Allen*, supra, slip opinion at Page 2. The Court concluded that "our decision in *Batson* should not be applied retroactively on collateral review of convictions that became final before our opinion was announced[1]," Id. at 2, 3, footnote of the Court omitted.

Finding that the rule in *Batson* v. *Kentucky* "is an explicit and substantial break with prior precedent" *Allen*, supra, at 3, the Court employed the three factors set forth in *Solem* v. *Stumes*, supra, quoting *Stovall* v. *Denno*, supra, as related to *Linkletter* v. *Walker*, supra, analyzed the same vis a vis *Batson*, and determined nonretroactivity would control. A different result is compelled upon direct review.

A. The Purpose To Be Served By The New Standards.

Over one hundred years ago,

---

to *Batson*, supra], was held to be applicable to cases pending on direct appeal [See: *State* v. *Jones*, 485 So.2d 1283 (Fla. 1986), and *State* v. *Castillo*, 486 So.2d 565 (Fla. 1986)] wherein the Court stated, "Our comment in *Neil* * * * was intended to apply to completed cases."

> "this court reversed a state conviction on the ground that the indictment charging the offense had been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks is practically a brand upon them, affixed by law, an assertion of their inferiority and a stimulant to race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder* v. *West Virginia*, 10 OTTO 303, 100 U.S. 303, quoted in *Vasquez* v. *Hillery*, ___ U.S. ___, 106 S.Ct. 617 (1986).

When constitutional error "calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. * * * Similarly when a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained" *Vasquez*, supra: [NOTE: Justice White did not join in the foregoing paragraph].

Although the attorney "for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done,' as he is the 'servant of the law * * *. '" *United States* v. *Agurs*, 427 U.S. 97 at 112 (1976), citing to *Berger* v. *United States*, 295 U.S. 78 t 88. As the *Berger* Court noted, while a prosecutor may strike "hard blows, he is not at liberty to strike foul ones."

The dissent from the denial of certiorari in *McCray* v. *New York*, 103 S.Ct. 2438 (1983) contained the following cogent language:

> "In Swain a closely divided court held that the prosecutor's use of peremptory challenges to strike

> Negroes from the jury panel in one particular case did not deny the defendant equal protection of laws. The majority reasoned that '[t]he presumption in any particular case must be that the prosecutor in using the state's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.' Id. at 222. The majority concedes that circumstances might arise where the purposes of the peremptory challenges are being perverted. Id. at 224."

It is worthy of note that in *Batson*, supra, the sole showing made by the Petitioner, and that which the Court held justified a reversal for a hearing upon the allegations, giving the prosecution, if "purposeful discrimination" be shown, an opportunity to "come forward with a neutral explanation for his action" [*Batson*, 106 S.Ct. 1712 at 1723] was that the prosecution excluded all black jurors peremptorily. In the case at bar, a hearing in fact, was had, albeit initially for an inquiry into the prosecution's telephonic attempt to exclude all blacks from the second venire panel. Purposeful discrimination was established, it is submitted.

"The purpose of trial by jury, as noted in *Duncan* [*Duncan* v. *Louisiana*, 391 U.S. 145 (1968)] is to prevent government oppression by providing a 'safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge' 391 U.S., at 156 "*Burch* v. *Louisiana*, 441 U.S. 130, 134. Of course, concomitant therewith "is the determination of the truth," *Tehan* v. *United States ex rel Shott*, 382 U.S. 406, 416 (1966). The jury makes this decision, and "[a]ny practice that threatens the jury's ability properly to perform that function

poses a similar threat to the truth determining process itself." *Brown* v. *Louisiana*, 447 U.S. 323, 335 (1980).

The Assistant United States Attorney involved in the case at bar deliberately sought to exclude blacks based upon his feelings that were blacks upon the jury, it would result in his "inability to convince all the jurors of the accused's guilt" and he, by his exercise of peremptory challenges, removed any "guarantee that the minority voices will actually be heard"[12] *Brown*, supra, at 332 [footnote of the Court omitted; however the observations regarding a "hung jury" are quite applicable at bar].

The prosecutor's statements in the case at bar are quite akin to those presented the Appeals Court in *Booker* v. *Jabe*, 775 F.2d 762 (6th Cir. 1985), wherein that state court prosecutor had said, inter alia, [to a fellow prosecutor, apparently] "* * * we can get a conviction in this case if we don't get a black jury." Not only did the prosecutor not deny the same, he attempted to justify his actions by stating he was a "trial lawyer" and blacks apparently caused "four consecutive hung juries three years ago" *Booker* v. *Jabe*, at 765. While finding itself foreclosed from reversing upon an "equal protection" argument due to this Court's ruling in *Swain* v. *Alabama*, the Appeals Court noted that when *Swain* had been decided, the Sixth Amendment had not yet been held binding upon the States [*Duncan* v. *Louisiana*, 391 U.S. 145 (1968)], and therefore, decided and reversed the matter in conformance with Sixth Amendment provisos, which is what is in fact presented herein. Worthy of quote for consideration in this point is the following language by the Sixth Circuit:

> "Our review of the Supreme Court's rationale for deciding these Sixth Amendment controversies leads to the following conclusions. The Sixth Amendment

> guarantees that a criminal charge will not be tried before a jury that fails to represent a cross-section of the community as a consequence of a method of jury selection that systematically excludes a cognizable group from jury service. Two rationales support this requirement. First, an impartial jury may protect the defendant from an improper conviction by bringing laypersons' common sense to bear upon the evidence supporting the prosecution's charges. Second, an impartial jury represents diverse elements of the community from which it is drawn and thereby makes a vital contribution to public confidence in the integrity and democracy of the judicial system. The impartial jury provides its safeguards during trial and, more significantly, during its deliberations. It is during deliberation that the diverse experiences of the members of a properly constituted jury are brought to bear on the often subtle nuances involved in evaluating witnesses' credibility and permissive inferences drawn from the evidence. Only in returning its verdict does the jury express the community's decision to punish or free the defendant."

Thus, the Petitioner urges upon the Court, that "serving a criminal defendant's interest in neutral jury selection procedures," *Allen*, supra, at 4, enhances the truth-finding process at trial to the degree that it must be held retroactive.

While *Batson*, supra, insures that States' "do not discriminate against citizens who are summoned to sit in judgment against a member of their own race," Id. at 4, it need be remembered that the case at bar was a Federal prosecution with an officer of the United States Government engaging in the discrimination.

Respectfully taking issue with the Court in one aspect of the holding in *Allen*, supra, and in particular that "the new rule joins other procedures that protect a defendant's interest in a neutral factfinder," Id. at 4, the Petitioner

would note that in almost all Federal prosecutions, voir dire is generally conducted by the trial judge of the jury as a whole, and, as opposed to individual voir dire by counsel, does not provide the basis for analysis of ability of jurors that one might wish. And, a jury instruction not to base a decision on bias, passion or prejudice, may not be sufficient [See particularly: *United States* v. *Heller*, 785 F.2d 1524 (11th Cir. 1986)].

Thus, the Petitioner would suggest to the Court that the accuracy and truthfinding process of criminal trials is only enhanced by the rule in *Batson*.

B. The Extent Of Reliance By Law Enforcement Authorities On The Old Standards.

The Court in *Allen*, as regards the above, held:

> "Moreover, the factors concerning reliance on the old rule and the effect of retroactive application on the administration of justice weigh heavily in favor of nonretroactive effect. As noted above, Batson not only overruled the evidentiary standard of *Swain*, it also announced a new standard that significantly changes the burden of proof imposed on both defendant and prosecutor. There is no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably relied on the standard of *Swain*[3]." [footnote of the Court omitted] *Allen*, supra at 5.

Justice Marshall, in his dissenting opinion, however, finds that "the Court seriously overestimates the 'reliance interest of law enforcement officials' in the old regime. This is not a case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on

account of their race violated the Equal Protection Clause.". *Allen*, dissenting opinion at Page 4.

The instant situation, aside from not being one which concerns the "Equal Protection Clause" differs from the usual case heretofore brought under *Swain*, as the issue of burden of proof or evidentiary standard is not present. Due to governmental misconduct, an inquiry was had at the trial level. The Appeals Court held *Swain* applied in that Petitioner was unable to prove discrimination in case after case or, as the Court fully phrased it, "Systematic and intentional conduct on the part of the government calculated to exclude blacks from juries." [J.A. 56].

It is submitted that it has been the law since *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) that one could not purposefully discriminate against members of a defendant's race. As the Court stated in *Batson*, supra,

> "The principles announced in *Strauder* never have been questioned in any subsequent decision of this court. Rather, the court has been called upon repeatedly to review the application of those principles to particular facts[13] [footnote omitted]. A recurring question in these cases, as in any case alleging a violation of the Equal Protection Clause, was whether the defendant had met his burden of proving purposeful discrimination on the part of the state." Batson, supra, 106 S.Ct. at 1719.

Thus, the principle prohibiting exclusion has been in existence, only the method of proof has changed, as the old standard rarely afforded the ability to prove such exclusion, particularly in light of the presumption of proper uses of challenges [Compare: *Booker* v. *Jabe*, supra; Statement of Case herein; and *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984)].

It is submitted that such reliance, as Justice Marshall suggests, may have been misplaced in cases such as the one at bar, especially where actual proof has been established.

Even if, however, reliance on the *Swain* standard were prevalent throughout the country, and thereby precludes retroactivity under collateral review, the Petitioner offers that the same ruling ought not apply to those cases on direct review.

The Court in *Solem* v. *Stumes*, supra, at 1343, authored the following:

> "Unjustified 'reliance' is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases, or was a 'clear break with the past'[6]." [footnote of the Court omitted].

The decision of the Court in *Batson*, it is submitted, was foreshadowed by earlier cases. At the sake of redundancy, the principle espoused in *Batson* has a long history indeed. And, it has been acknowledged that *Swain* has been the subject of "almost universal and often scathing criticism" *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984) quoting the dissent of Justice Marshall in *McCray* v. *New York*, 461 U.S. 961 (1983); see also: *United States* v. *Childress*, 715 F.2d 1313 (8th Cir. 1983).

This Court, in 1983, denied certiorari in *McCray* v. *New York*, supra, however, as the Sixth Circuit noted in *Booker* v. *Jabe*, supra:

> "A majority of the Supreme Court has expressed its willingness at the proper time to consider 'whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from a jury[2]." [footnote omitted] *McCray* v. *New York*, 461 U.S. 961 (1983).

Justice Stevens, joined by Justices Powell and Blackmun, did not reflect disagreement with the dissenting opinion of Justices Marshall and Brennan, but rather, expressed the belief "further consideration of the substantive and procedural ramifications of the problem by other Courts will enable us to deal with the issue more wisely at another date,", *McCray* v. *New York*, supra, allowing the States "to serve as laboratories in which the issue receives further study."

California, Massachusetts and Florida had, by the time of *Batson*, held in a similar vein, as did the Second Circuit in *McCray* v. *Abrams*, supra, on Sixth Amendment grounds, which was the same avenue employed by the Sixth Circuit in *Booker* v. *Jabe*, supra. Compare also: *United States* v. *Green*, 742 F.2d 609 at 611 (footnote) (11th Cir. 1984) and as quoted in Petition for Writ of Certiorari at Page 8; *United States* v. *Hawkins*, 781 F.2d 1483 (11th Cir. 1986); *United States* v. *Jackson*, 696 F.2d 578 (8th Cir. 1982). Thus, it is submitted that it could reasonably be foreseen that the Court, having long adhered to the principles of condemning discrimination in the "system of justice" due to race, would implement a procedure to protect a defendant's Sixth Amendment guarantees from discriminatory use of peremptory challenges. Indeed, the Court in *Swain* held "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause" *Swain*, 380 U.S. 202, 204. Therefore, prosecutors have "been on notice" that any deliberate conduct was violative of the Constitution; the lessening of a "crippling burden of proof" as announced in *Batson*, supra, ought not provide the offender a refuge nor deny the person aggreived the benefit of the ruling. [See: Justice White's opinion in *Batson*, supra].

Finding that "the reliance interest of law enforcement officials is 'compelling'", the *Allen* Court concludes this "supports a decision that the new rule should not be retroactive" *Allen*, supra, citing to *Solem* v. *Stumes*, supra, at 650.

Following *Solem*, *Shea* was decided, and *Edwards*, despite compelling reliance on the old standards, was held to apply retroactively to cases pending direct appeal.

Even if there be compelling reliance on the old standards in the instant case, the decision in *Batson* ought apply to this direct appeal.

C. The Effect On The Administration Of Justice Of A Retroactive Application Of New Standards.

Referring to its opinion in *Solem* v. *Stumes*, supra, the *Allen* Coourt stated that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice," *Allen*, supra, at 5. Quoting in part from *Solem* v. *Stumes*, supra, at 650, the Court continued: "[M]any final convictions therefore would be vacated, with retrial 'hampered by problems of lost evidence, faulty memory, and missing witnesses'", Id. at 5, particularly after the passage of years since finality attached.

As the Court quite apparently recognized in *Shea* v. *Louisiana*, a different circumstance occurs in cases still pending final review. In fact, in response to this, the *Shea* Court stated, "We note, furthermore, that several courts had applied *Edwards* to cases pending on direct review without expressing concern about lapse of time or retroactivity and without any apparent administrative difficulty." *Shea* v. *Louisiana*, supra, 105 S.Ct. at 1071.

As Petitioner pointed out above, Florida has held its equivalent of *Batson*, *State* v. *Neil*, supra, retroaction to cases pending direct review.

Retroactivity of *Batson* to cases pending direct review would clearly limit the number of affected cases the *Allen* decision expressed concern regarding, and any burden upon the administration of justice would at best be minimal, for the elapsed time ought not be any greater than any other case pending review and where reversal upon other grounds might occur.

In closing, this Court has generally held Sixth Amendment cases nonretroactive [See: ie, *DeStefano* v. *Woods*, 392 U.S. 634 (1968); *Gosa* v. *Mayden*, 413 U.S. 665 (1973)]. Of course, in those cases, the basic integrity of the factfinding process was not in question. When, however, the integrity of the factfinding process was in fact called into question, the Court did hold retroactivity would apply, at least to that case pending direct review, and those other few affected by the prior procedure. *Brown* v. *Louisiana*, 447 U.S. 323 (1980), and see concurring opinion of Justice Powell, joined by Justice Stevens at 335. The Petitioner submits that while the facts of *Brown*, supra, differ, obviously, from this case, the same rationale as to the removal of "minority voices," "hung juries," and "less accurate factfinding" *Brown* v. *Louisiana*, supra, at 332, is just as applicable. As the *Brown* majority [at 332] stated:

> "Though the line separating the permissible jury practice from the impermissible may not be the brightest, [citations omitted] a line must be drawn somewhere and the constitutional inviolability of that border must be scrupulously respected lest the purpose and functioning of the jury be seriously impaired."

Coupling this with the rather minimal effects upon the administration of justice that a limited ruling of retroactivity would entail, the Court ought hold *Batson* retroactive to cases pending direct review.

CONCLUSION

The Court should hold that *Batson* v. *Kentucky*, supra, applies to WILLIE DAVIS BROWN's conviction which was not yet final and the time of the decision and reverse the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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OCTOBER TERM, 1986

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PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the holding in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), should be given retroactive effect to cases pending on direct appeal.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 53-61) is reported at 770 F.2d 912.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1985. A petition for rehearing was denied on September 12, 1985 (J.A. 66). The petition for a writ of certiorari was filed on October 10, 1985, and granted on June 2, 1986 (J.A. 67). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, peti-

tioner was convicted of conspiracy to possess marijuana and cocaine with intent to distribute them, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment. The court of appeals affirmed. J.A. 53-61.

1. The evidence at trial showed that petitioner supplied drugs from his home in Florida for distribution in Oklahoma. Several co-conspirators testified about petitioner's drug-dealing activities. In particular, the co-conspirators testified that petitioner had supplied a large quantity of marijuana that was seized in Florida while in transit to Oklahoma. J.A. 54. The evidence also included testimony from a Florida deputy sheriff who described his previous arrest of petitioner in 1980. In that incident, petitioner was arrested at a Florida airport after giving a suitcase containing 17 pounds of marijuana to another person. J.A. 54-55.

2. Petitioner and co-defendant Sam Ponder, both black, were tried for the drug conspiracy. Ponder was represented by E. Melvin Porter, a prominent black member of the Oklahoma State Senate. During the jury voir dire the prosecutor used two of his peremptory challenges to excuse black jurors (J.A. 14). No black jurors served on petitioner's jury (J.A. 55).

During the second day of the jury selection, before additional veniremen were summoned, the prosecutor telephoned the jury clerk. Somewhat later during the trial, the district court questioned the jury clerk in chambers and later held a hearing concerning the incident (J.A. 2-52). The prosecutor testified that he had asked the jury clerk how many blacks would be called as additional veniremen, but he denied that he had intended to influence the jury clerk's selection

of the potential jurors (J.A. 14-15). The prosecutor recalled that he had said to the jury clerk, "[w]e would like to have as few black jurors as possible" (J.A. 51). The jury clerk remembered the conversation differently. She recalled the prosecutor's comment as having been, "Don't get any blacks on this jury" (J.A. 38). The jury clerk testified that she took no action in response to the prosecutor's remarks (J.A. 11, 55).

The prosecutor explained at the hearing that, based on personal experience, he considered Senator Porter a gifted attorney who had a special appeal to blacks in the community. The prosecutor thus planned to excuse blacks who knew or had heard of Senator Porter. J.A. 15-16, 19. The district court concluded that the prosecutor's contact with the jury clerk, while raising serious questions of professional impropriety, did not affect the integrity of the jury selection process (J.A. 11, 45-46).

3. The court of appeals affirmed the conviction and rejected petitioner's contention that the prosecutor's use of peremptory challenges or his contact with the jury clerk violated petitioner's right to an impartial jury (J.A. 56-57). Relying on *Swain* v. *Alabama*, 380 U.S. 202 (1965), the court reasoned that the prosecutor's use of peremptory challenges in this case did not establish a systematic practice of excluding blacks in "case after case" (J.A. 56). The court condemned the prosecutor's contact with the jury clerk. Because the clerk disregarded the prosecutor's statement, however, the court concluded that the contact could not have influenced the jury selection process (J.A. 60).[1] Thus, the prosecutor's conduct

[1] In rejecting petitioner's argument concerning the prosecutor's contact with the jury clerk, the court of appeals stated

"had no impact on the possibility that the jury would not represent a cross-section of the community" (J.A. 60).[2]

4. The petition for a writ of certiorari was filed after this Court granted certiorari in *Batson* v. *Kentucky*, No. 84-6263. After *Batson* was decided on April 30, 1986, the Court granted the petition limited to the question of the retroactivity of *Batson* in cases pending on direct review. The case was set for argument in tandem with *Griffith* v. *Kentucky*, No. 85-5221, in which certiorari was granted limited to the same issue. J.A. 67.

INTRODUCTION AND SUMMARY OF ARGUMENT

It bears emphasis at the outset that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved." *Johnson* v. *New Jersey*, 384 U.S. 719, 728 (1966); accord, *Gosa* v. *Mayden*, 413 U.S. 665, 675-

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that the district court thoroughly explained the matter to the jury (J.A. 60). The statement of the court of appeals is incorrect. The court apparently meant that the district court had explained this issue to counsel. There was, of course, no reason to discuss the matter with the jury.

[2] We do not defend the prosecutor's telephone contact with the jury clerk. No matter what the prosecutor actually said, he should not have made the call in the first place. Nonetheless, the court of appeals was correct to observe that the prosecutor's call to the jury clerk had no effect on the composition of the jury and therefore provided no basis for reversal of the conviction. In any event, even if it gave rise to an independent ground for reversal, the prosecutor's indefensible conduct in this case would have no direct impact on the analysis of the more general question on which this Court granted certiorari —whether *Batson* should be given retroactive effect in cases pending on direct review.

676 (1973) (plurality opinion). When a decision, like *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), touches on such sensitive areas as race relations, there is a temptation to assert, since it is rooted in profound moral and constitutional values, that it has always been the "true" law. The retroactivity jurisprudence of this Court, however, has avoided the fiction that overruled decisions never existed and the mistaken notion that constitutional rights are somehow cheapened by holding them nonretroactive. The Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." *Williams* v. *United States*, 401 U.S. 646, 651 (1971) (plurality opinion) (citing *Linkletter* v. *Walker*, 381 U.S. 618 (1965)); accord, *Gosa* v. *Mayden*, 413 U.S. at 676. And the Court "do[es] not disparage a constitutional guarantee in any manner by declining to apply it retroactively." *Johnson* v. *New Jersey*, 384 U.S. at 728; accord, *Michigan* v. *Payne*, 412 U.S. 47, 55 n.10 (1973).

A. Although the retroactivity of new constitutional decisions once depended on a three-factor test, this Court has recently adopted a new approach to retroactivity questions in cases pending on direct review. In such cases, the Court has stated that it will hold new decisions automatically retroactive, unless the decisions constitute a clear break with the past. This Court's decision in *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), overruled *Swain* v. *Alabama*, 380 U.S. 202 (1965), and therefore announced a clear break with the past. *Batson* is no less a clear break simply because it may have been foreshadowed by other cases. This Court has invari-

ably recognized that decisions that overrule prior precedent are clear breaks with the past, even if it may have been possible to foresee the overruling. For that reason, this Court's new approach to retroactivity requires that *Batson* be held nonretroactive in cases pending on direct review.

B. Even under the three-factor test that the Court previously applied to resolve all retroactivity questions, it would still be appropriate to hold that *Batson* is not retroactive. The Court has already determined in *Allen* v. *Hardy*, No. 85-6593 (June 30, 1986) (per curiam), that none of the three factors favors retroactivity, and thus that *Batson* should not be applied to cases that had become final by the time *Batson* was decided. That holding was correct, and it supports nonretroactivity with regard to cases on direct as well as collateral review.

In *Allen* v. *Hardy*, the Court assumed that *Batson* has some positive impact on the truthfinding function of juries. The Court nonetheless held that that factor was not sufficient to require that the decision be held retroactive. The Court has consistently denied retroactive effect to decisions that have some positive impact on the truthfinding function when those decisions, like *Batson*, serve a mixture of constitutional values and complement other safeguards of reliability. In this regard, it is particularly noteworthy that the Court denied retroactive effect to the decisions requiring jury trials in serious criminal cases and outlawing the systematic exclusion of women from state juries.

In *Allen* v. *Hardy*, the Court also found that prosecutors and lower courts justifiably had relied on *Swain*. The good-faith reliance of lower courts is unquestioned, and it was certainly reasonable for

prosecutors to read *Swain* to permit the exercise of peremptory challenges against blacks on the basis of race in particular cases. The reasonableness of that interpretation is strongly confirmed by the language of *Swain*, no matter how wrong the Court may now feel that such an interpretation of the Constitution was.

Finally, in *Allen* v. *Hardy* the Court found that the retroactive application of *Batson* on collateral review would disrupt the administration of justice, because hearings would be necessary and it would be impossible in virtually every case for the prosecutor to recall the reasons for his peremptory challenges. Those considerations apply equally on direct review. The number of cases pending on direct review, of course, is smaller than the number on collateral and direct review combined, but there are nonetheless a significant number of pending cases. This factor, like the others, therefore counsels against holding *Batson* retroactive to cases pending on direct review at the time *Batson* was decided.

ARUGMENT

IN CASES PENDING ON DIRECT APPEAL, THE DECISION IN *BATSON* v. *KENTUCKY* SHOULD NOT BE GIVEN RETROACTIVE EFFECT

In *Swain* v. *Alabama*, 380 U.S. 202 (1965), this Court concluded that it could not "hold that the striking of Negroes in a particular case is a denial of equal protection of the laws" (380 U.S. at 221). The Court confirmed that peremptory challenges are "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty" (*id.* at 220). The

Court added that "[t]o subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge" (*id.* at 221-222).

Swain was subjected to some academic criticism, and some courts held that the use of peremptory challenges in an individual case was subject to challenge under provisions of state constitutions or principles of federal law other than constitutional equal protection (see *Batson* v. *Kentucky*, No. 84-6263 (Apr. 30, 1986), slip op. 1 n.1, 9 n.14). Before *Batson*, however, no court had held that federal equal protection principles were violated by the prosecutor's exercise of peremptory challenges to exclude members of the defendant's race from the petit jury at the defendant's trial.

On April 30, 1986, the Court brought about the "radical change" that it had eschewed in *Swain*. Explicitly overruling everything in *Swain* that was contrary to the new decision, the Court expressly contradicted *Swain* and held that "the Equal Protection Clause forbids the prosecutor" in a particular case "to challenge potential jurors solely on account of their race" (*Batson* v. *Kentucky*, slip op. 9, 20 n.25). Thereafter, this Court recognized in *Allen* v. *Hardy*, No. 85-6593 (June 30, 1986) (per curiam), slip op. 3, that the rule in *Batson* was "an explicit and substantial break with prior precedent."

As we show below, under the approach to retroactivity questions adopted by a majority of this Court in *United States* v. *Johnson*, 457 U.S. 537 (1982), and *Shea* v. *Louisiana*, No. 82-5920 (Feb. 20, 1985), *Batson* should be held nonretroactive because it overruled *Swain*. The Court in *Johnson* abandoned the

three-factor approach of *Stovall* v. *Denno*, 388 U.S. 293 (1967), for cases pending on direct appeal, but preserved certain principles from the Court's earlier retroactivity decisions. Under one of those principles —the "clear break" principle—the nonretroactivity of *Batson* is "preordained" (*id.* at 558). Even under the analysis previously employed by the Court in making retroactivity determinations, *Batson* would still be held nonretroactive, because none of the traditional factors set forth in *Stovall* v. *Denno* favors retroactivity.

A. Because *Batson* Overruled *Swain* v. *Alabama*, It Should Be Held Nonretroactive

1. Until 1965, the Court gave full retroactive effect to each interpretation of the Constitution prescribing rules for the conduct of criminal trials. The Court changed its approach in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). After *Linkletter*, when faced with a question of retroactivity, the Court typically inquired into three issues: (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). At all times, however, there were Members of the Court who found application of the *Stovall* factors an unsatisfactory approach (see generally *United States* v. *Johnson*, 457 U.S. at 545 & n.9, 547-548 & n.10). Justice Harlan, in particular, would have applied all new rules of constitutional law to all cases on direct review (see *Desist* v. *United States*, 394 U.S. 244, 258-259 (1969) (dissenting opinion)).[3]

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[3] By contrast, in cases on collateral review Justice Harlan would have followed an approach of automatic nonretroac-

In *United States* v. *Johnson*, *supra*, the Court revised its approach to retroactivity. In place of the three-factor *Stovall* test, the Court concluded, as Justice Harlan had suggested, that new decisions should ordinarily be held retroactive to cases pending on direct review. See also *Shea* v. *Louisiana*, No. 82-5920 (Feb. 20, 1985), slip op. 8. As an exception to that rule, the Court held that a new decision would not be given retroactive effect, even to cases on direct review, if the new decision represented "a clear break with the past" (457 U.S. at 549). The Court noted that it had always found the necessary "clear break" whenever "a decision explicitly overrules a past precedent of this Court" (*id.* at 551).

The *Johnson* Court made it clear that, notwithstanding the prior *Stovall* approach, a determination that a decision is a clear break with the past *ends* the inquiry into retroactivity on direct appeal of a criminal case, in contrast to civil cases, in which that determination *begins* the inquiry (457 U.S. at 549-550 n.12). Applying its new analysis, the Court held that *Payton* v. *New York*, 445 U.S. 573 (1980), was retroactive on direct appeal. The Court did so, however, only after noting that *Payton* did not overturn "any consistent judicial history," so that its nonretroactivity was not "preordained under the 'clear break' principles stated above" (457 U.S. at 558).

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tivity with certain limited exceptions (see *Mackey* v. *United States*, 401 U.S. 667, 681-695 (1971) (separate opinion)). The Court has not adopted this aspect of Justice Harlan's theory but instead has continued to apply the *Stovall* factors on collateral review (see *Allen* v. *Hardy*, slip op. 3; *Shea* v. *Louisiana*, slip op. 7; *id.* at 1 (Rehnquist, J., dissenting); *Solem* v. *Stumes*, 465 U.S. 638, 643 (1984); *Johnson*, 457 U.S. at 563-564 (Brennan, J., concurring)).

By preserving this category of decisions nonretroactive on direct appeal, the Court partially rejected Justice Harlan's approach. Justice Harlan would have held new constitutional decisions retroactive on direct appeal in all criminal cases, including those in which precedent had been overruled.[4] The *Johnson* Court stated explicitly that it was "preserving, rather than overruling," the cases endorsing nonretroactivity of decisions that overruled prior precedent (457 U.S. at 563 n.21). The Court thus agreed with the view earlier expressed by Justice Brennan that, notwithstanding the general merit of Justice Harlan's approach, that approach goes too far when it is used to justify giving retroactive effect to a decision

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[4] Justice Harlan dissented on this ground in *Desist* v. *United States*, 394 U.S. 244 (1969); *Williams* v. *United States*, 401 U.S. 646 (1971); and *Mackey* v. *United States*, 401 U.S. 667 (1971). *Desist* held nonretroactive on direct appeal the decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which specifically rejected *Goldman* v. *United States*, 316 U.S. 129 (1942), and *Olmstead* v. *United States*, 277 U.S. 438 (1928). *Williams* held nonretroactive on direct appeal the decision in *Chimel* v. *California*, 395 U.S. 752 (1969), which overruled *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and *Harris* v. *United States*, 331 U.S. 145 (1947). *Mackey* held nonretroactive on direct appeal the decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), which overruled *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955). Commentators have been quick to point out this divergence between Justice Harlan's approach and that taken in *Johnson*. See, *e.g.*, Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 Nw. U.L. Rev. 1062, 1075 (1985); Note, *Retroactivity and the Exclusionary Rule: A Unifying Approach*, 97 Harv. L. Rev. 961, 970 & n.72 (1984).

that "overrule[d] clear past precedent of this Court." *United States* v. *Peltier*, 422 U.S. 531, 548-549 & n.7 (1975) (dissenting opinion).

Although the holding in *Johnson* was confined to the retroactivity of Fourth Amendment decisions (457 U.S. at 562), the Court's extensive reexamination of the post-*Linkletter* decisions covered retroactivity decisions involving a broad range of constitutional provisions. In addition, the Court has subsequently extended *Johnson*'s reasoning beyond the Fourth Amendment context (see *Shea* v. *Louisiana*, slip op. 8 (applying *Johnson* in case involving Fifth Amendment privilege against compulsory self-incrimination); *Solem* v. *Stumes*, 465 U.S. 638, 646 (1984) (same)). The Court has thus confirmed that, as a general principle, a new decision may be "so clearly a break with the past that prior precedents mandate nonretroactivity" (*Shea* v. *Louisiana*, slip op. 6; see also *Stumes*, 465 U.S. at 646).[5]

2. Although neither petitioner nor amici curiae even acknowledge the "clear break" exception recognized in *Johnson*, they do assert that *Batson* was not a clear break with the past. Instead, they argue, *Batson* was foreshadowed by earlier decisions that should have put prosecutors on notice that it was improvident to rely on *Swain*'s advice (380 U.S. at

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[5] In *Shea* the Court held that the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), should be applied retroactively to cases pending on direct appeal. Earlier, the Court had held in *Stumes* that *Edwards* would not be applied retroactively on collateral review but had noted that because *Edwards* "did not overrule any prior decision or transform standard practice * * * it [was] not the sort of 'clear break' case that is almost automatically nonretroactive" (465 U.S. at 647).

220-221) that a peremptory challenge might be exercised on the basis of race.[6]

As this Court has made clear several times, the fact that a decision has been foreshadowed does not in any way make it less of a "clear break," so long as it overrules a prior decision. Few decisions have had their overruling more clearly foreshadowed than *Olmstead* v. *United States*, 277 U.S. 438 (1928), which held that a physical trespass is necessary before the Fourth Amendment has any application to electronic surveillance.[7] Yet the Court denied retro-

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[6] In a related argument, amici deny that *Swain* contained any such advice. Amici suggest that any prosecutor who relied on *Swain* was not engaging in legitimate conduct but was knowingly engaged in constitutionally prohibited discrimination with the knowledge that *Swain* imposed an evidentiary burden that insulated that conduct from review. They assert that any reliance on *Swain* was therefore illegitimate. Br. 25-28. This argument is also featured in the brief for petitioner in No. 85-5221. We show at pp. 29-40, *infra*, that this argument misconstrues *Swain*. For present purposes, it suffices to note that there is no basis in the *Johnson* analysis to conclude that there is a relevant distinction between cases overruling an evidentiary burden imposed in a prior case and cases overruling a norm of permitted conduct stated in a prior case.

[7] Although *Olmstead* is the clearest example, there are certainly other decisions whose overruling was predictable. For example, Justice Brennan noted that by the time of *Chimel* v. *California*, 395 U.S. 752 (1969), the doctrinal underpinnings of *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), permitting broad searches incident to lawful arrests, "had long since been rejected" (*Williams* v. *United States*, 401 U.S. 646, 661 (1971) (concurring in the result)). Neither Justice Brennan nor the *Williams* plurality, however, found the erosion of the doctrinal underpinnings of *Harris* and *Rabinowitz* a sufficient

active effect to the decision that overruled it. *Desist* v. *United States*, *supra* (denying retroactive effect to *Katz* v. *United States*, 389 U.S. 347 (1967)). As the Court noted in *Desist*, "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past * * *" (394 U.S. at 248).[8] Just three Terms ago, the Court reiterated the same point—that a decision can be both foreshadowed and a clear break with the past. The Court wrote: "A decision that overrules much-criticized precedent may well have been clearly foreshadowed. * * * Our cases indicate that even in this situation authorities are generally entitled to rely on existing case law, what-

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basis to give *Chimel* retroactive effect. See also Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the Linkletter Doctrine*, 60 J. Crim. L., Criminology & Police Sci. 417, 435-436 & n.174 (1969) (noting other precedents that were held sufficient to defeat retroactivity of the decisions overruling them even though the precedents were "under attack" and inevitably to be overruled).

[8] The foreshadowing of the overruling of *Olmstead* stands in marked contrast to this Court's pre-*Batson* treatment of *Swain*. Dissenting in *Desist*, Justice Fortas asserted that *Olmstead* was "moribund" long before its overruling and that "there [could] be no doubt whatever that if the present cases had been presented to this Court a day, a year, or a number of years before *Katz*, we would have held that the petitioners' constitutional rights had been violated" (394 U.S. at 277, 279). *Swain*, however, was only 20 years old at the time *Batson* arose, and Members of the Court had referred to *Swain* with apparent approval in fairly recent times. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) ("Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part * * *."); *Apodaca* v. *Oregon*, 406 U.S. 404, 413 (1972) (plurality opinion) (relying on *Swain*).

ever its disrepute" (*Solem* v. *Stumes*, 465 U.S. at 646 n.6).

In sum, any "foreshadowing" of *Batson* is simply irrelevant.[9] No matter what the state of the law before *Batson*, this Court's precedents require that it be denied retroactive effect simply because it overruled *Swain*.[10]

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[9] If any foreshadowing of *Batson* were relevant, we would by no means concede that the outcome in *Batson* was foreshadowed in a meaningful way. Only two Justices had stated that they would overrule *Swain*. See *McCray* v. *New York*, 461 U.S. 961, 963-970 (1983) (Marshall, J., dissenting from denial of certiorari). The three other Justices who had recently spoken to the issue had indicated no view on the merits, saying only that they considered the issue sufficiently important to give plenary consideration at some future date after "further consideration of the substantive and procedural ramifications of the problem by other courts" (*id.* at 962 (opinion of Stevens, J.)). Moreover, the suggestion that *Batson* was foreshadowed by lower courts' decisions resting on bases other than the Equal Protection Clause misses the point. Those courts based their rulings on grounds other than equal protection precisely because they believed that *Swain* was not open to challenge. For example, the Supreme Court of California "assume[d] that if the present question were before the high court it would reaffirm *Swain*." *People* v. *Wheeler*, 22 Cal. 3d 258, 285, 583 P.2d 748, 767, 148 Cal. Rptr. 890, 908 (1978). See also *Booker* v. *Jabe*, 775 F.2d 762, 766 (6th Cir. 1985), vacated and remanded *sub nom. Michigan* v. *Booker*, No. 85-1028 (June 30, 1986); *McCray* v. *Abrams*, 750 F.2d 1113, 1119, 1124 (2d Cir. 1984), vacated and remanded, No. 84-1426 (June 30, 1986).

[10] The lower courts that have addressed the question whether *Batson* should be afforded retroactive application have held that it should not, in part because *Batson* overruled *Swain*. In *Esquival* v. *McCotter*, 791 F.2d 350 (1986), the Fifth Circuit, declining to apply the rule in *Batson* retroactively to a collateral federal proceeding, observed that *Bat-*

B. Traditional Retroactivity Analysis Favors Holding *Batson* Nonretroactive

Johnson and *Shea* applied the Court's new retroactivity analysis to decisions construing the Fourth Amendment and the principles of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). We do not believe that there is any persuasive reason that the analysis of *Johnson* should be applied only in those two contexts. Nevertheless, if the Court declines to apply the *Johnson* analysis in other settings, it should look to the traditional three-part retroactivity test set forth in *Stovall* v. *Denno*, *supra*. The *Stovall* test is also useful to demonstrate that, even apart from the analysis of *Johnson*, the rule in *Batson* would not have been held retroactive under any of this Court's prior precedents.

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son "overrules *Swain*" and "qualifies as 'a clear break with the past' which should not be applied retroactively" (791 F.2d at 352). In *Simpson* v. *Massachusetts*, No. 85-1931 (June 26, 1986), the First Circuit declined to apply *Batson* retroactively to a collateral attack on a criminal conviction. The court of appeals quoted with approval from the dissent of the Chief Justice in *Batson*, to the effect that *Batson* "clearly 'overrule[s] [a] prior decision' and drastically 'transform[s] standard practice' " (slip op. 5 (quoting *Batson*, slip op. 21 (Burger, C.J., dissenting) (quoting *Stumes*, 465 U.S. at 647))). Finally, the Supreme Court of North Carolina held, in *State* v. *Jackson*, 343 S.E.2d 814 (1986), that *Batson* did not apply retroactively, even on direct appeal, in part because *Batson* was a "clear break" with past precedent in which the Court "explicitly rejected the prior *Swain* requirement and unequivocally overruled *Swain*" (343 S.E.2d at 825). The Eleventh Circuit also recently noted that *Batson* "substantially altered the evidentiary burden, formerly prescribed by *Swain v. Alabama*, * * * that a criminal defendant must meet to make out an equal protection claim." *Fleming* v. *Kemp*, 794 F.2d 1478, 1483 (11th Cir. 1986).

Petitioner and amici curiae assert that the analysis in *Stovall* v. *Denno* requires that *Batson* be held retroactive. The Court, of course, has already applied the three-part *Stovall* test in assessing the retroactive application of *Batson* to cases on collateral review, and it has concluded that none of the three factors favors retroactivity. *Allen* v. *Hardy*, No. 85-6593 (June 30, 1986) (per curiam). Petitioner (Br. 17, 18 22) and amici (Br. 10 & n.2) disagree with the Court's determination. We submit that the Court correctly analyzed the *Stovall* factors in *Allen* v. *Hardy*. The *Stovall* approach to retroactivity is therefore no more helpful to petitioner than the approach adopted in *Johnson*.

1. The New Rule Does Not Have Such a Fundamental Impact on the Integrity of Factfinding as to Compel Retroactive Application

Under the first *Stovall* factor, retroactive effect is most appropriate when the purpose of the new standard "goes to the heart of the truthfinding function" (*Solem* v. *Stumes*, 465 U.S. at 645). "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect" (*Williams* v. *United States*, 401 U.S. at 653 (plurality opinion)).[11]

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[11] The *Williams* plurality took the view that this factor is sufficient to compel retroactive application even in the face of "good-faith reliance by state or federal authorities on prior constitutional law" (401 U.S. at 653). According to the *Johnson* majority, however, the purpose of the rule is "less critical than the Court's express threshold determination" that the new rule so changes the law that it should not be applied retroactively (457 U.S. at 549).

This Court already has decided that *Batson* does not so fundamentally implicate the integrity of the truthfinding process that the first *Stovall* factor favors retroactivity (*Allen* v. *Hardy*, slip op. 4). The Court did so even on the explicit assumption that "the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial" (*ibid.*). For two reasons, that assumption did not require a determination that the first *Stovall* factor favors retroactivity. *First*, the *Batson* rule was "designed 'to serve multiple ends'" (*ibid.* (quoting *Brown* v. *Louisiana*, 447 U.S. 323, 329 (1980) (plurality opinion)). Those ends include "ensur[ing] that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race," and "strengthen[ing] public confidence in the administration of justice" (*ibid.*; see *Batson*, slip op. 6-7). *Second*, "the new rule joins other procedures that protect a defendant's interest in a neutral factfinder," including voir dire and instructions channeling the jurors' role away from impermissible factors such as passion or prejudice (*Allen* v. *Hardy*, slip op. 4 & n.2). Therefore, the Court reasoned, there is a "high probability that the individual jurors seated in a particular case were free from bias" (*id.* at 4).

Although petitioner (Br. 13-18) and amici (Br. 11-25) urge the Court to reverse its determination on this issue, they offer nothing inconsistent with the Court's analysis. The major effort of the briefs is to show exactly what this Court has already assumed: that the *Batson* rule has some bearing on the truthfinding function in a criminal trial.[12] Amici admit

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[12] Petitioner and amici do suggest that the impact of *Batson* on the integrity of the truthfinding process is more fundamental than this Court recognized in *Allen*, but it is only the

(Br. 12) that the *Batson* rule serves multiple ends (accord, *Allen* v. *Hardy*, slip op. 2 (Marshall, J., dissenting)), and they do not dispute that, even in a pre-*Batson* case, other jury selection procedures make it highly likely that the individual jurors seated in a particular case were free from bias.[13] In these cir-

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adjectives in their briefs, not the research that they cite, that goes beyond what the Court said. Moreover, to reach the conclusion that the rule of *Batson* would have changed the outcome of a significant number of trials, petitioner and amici must indulge the gross generalization—not supported by their empirical data—that minority jurors will regularly be the most vehement advocates to acquit a defendant of the same race. But the rule of *Batson* is based on the unwillingness of courts to accept that kind of gross generalization (slip op. 17; see also Saltzburg & Powers, *Peremptory Challenges And The Clash Between Impartiality And Group Representation*, 41 Md. L. Rev. 337, 371 (1982)). Finally, petitioner and amici take no account of the fact that the prosecutor who is forbidden to use a peremptory challenge on a minority juror still has that peremptory challenge available to strike another juror he regards as likely to favor the defendant. Thus, the marginal impact of the minority juror will be limited not just because he is one of a number of jurors, but also because he replaces the person who seems most predisposed to vote the same way that—by petitioner's and amici's assumption—the minority juror is predisposed to vote.

[13] Petitioner (Br. 17-18) does suggest that group voir dire conducted by a judge is not as great a safeguard as voir dire conducted by counsel, and he asserts that a jury instruction "may not be sufficient." The first point is merely a quibble with the method used by particular courts to conduct voir dire, and the second point does nothing to undercut the Court's reasoning in *Allen* v. *Hardy*. The Court did not suggest that jury instructions, by themselves, are always sufficient to do away with potential bias on every jury. But the Court did hold that the jury instructions, combined with other safeguards, create a high probability of freedom from bias.

cumstances, as the Court noted in *Allen* v. *Hardy*, "the fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity" (slip op. 4).[14] That proposition finds ample support in this Court's cases.

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[14] We do not challenge the assumption that the *Batson* rule has some bearing on the truthfinding function in a criminal trial. Nonetheless, some comment on the literature cited in the brief of petitioner in No. 85-5221 is appropriate, lest the Court be led to believe that there is an overwhelming and unanimous body of social science research showing that a jury with minority representation will reach significantly different results from a jury without minority representation. The 15 sources cited in petitioner's brief in No. 85-5221 (at 22 n.7) were all cited to the Court in an appendix to a brief in *Batson* under the heading "Sociological Literature Concerning Blacks and the Jury System" (Br. of the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at A2-A3, *Batson*). As that heading implies, the studies cover a large range of subjects related to blacks and the jury system. *Some* of the literature empirically compares the decisionmaking of white and black jurors (*e.g.*, Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 Law & Psychology Rev. 103 (1979); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psychology 133 (1979)). Much of it does not (*e.g.*, H. Kalven & H. Zeisel, *The American Jury* 196-198 (1966) (profiling criminal defendants without any reference to jury decisionmaking); *id.* at 210-213 (discussing jurors' perception of categories of criminal defendants, including blacks, without regard to race of jurors); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. U.L.Q. 415 (discussing race of defendant but not race of jurors)). Only one article even arguably supports the assertion (85-5221 Pet. Br. 22 n.7) that a "pro-prosecution effect" resulting from the exclusion of blacks from juries is especially pronounced when "the government's evidence is insubstantial and the defendant is black." See Ugwuegbu, *supra*, 15 J. Experimental Soc. Psychology at 139-140.

In one of its earliest retroactivity cases, the Court denied retroactive effect to *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), despite recognizing that they "guard against the possibility of unreliable statements in every instance of in-custody interrogation." *Johnson* v. *New Jersey*, 384 U.S. 719, 730 (1966). The Court was aware that it thereby denied retroactive effect to decisions with some impact on the truthfinding process,[15] but it "emphasize[d] that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. * * * We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." 384 U.S. at 728-729.

In *Stovall* itself, the Court held that the new rules requiring the presence of counsel at pretrial lineups were nonretroactive even though "we should * * * assume there have been injustices in the past which could have been averted by having counsel present at the confrontation for identification" (388 U.S. at 299; see *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967)). The Court conceded that the new rules "are aimed at avoiding unfairness at trial by enhancing the reli-

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[15] The Court noted that it had already "denied retroactive application to *Griffin* v. *California*, [380 U.S. 609 (1965)], despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand" (384 U.S. at 729).

ability of the fact-finding process in the area of identification evidence" (*Stovall*, 388 U.S. at 298). Yet that was not enough to require that the new rules be applied retroactively. The Court noted that cases requiring the assistance of counsel at trial or on appeal had been held retroactive, but it held that the "certainty and frequency" of injustice in lineup cases "differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application" (*id.* at 299). As in *Stovall*, there can be no claim that *Batson* corrects a defect in the truthfinding process comparable to the absence of counsel at trial or on appeal. The possibility that the outcome of some cases might have been different, if *Batson* had been applied earlier, is "different in kind" from the type of impact on truthfinding that the *Stovall* Court had in mind in formulating this part of the retroactivity test. See also *Desist*, 394 U.S. at 249 n.14.[16]

A number of cases decided after *Stovall* are particularly instructive because they involve the right to an impartial jury, and it is the impartiality of past juries that is called into question by the asser-

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[16] The Supreme Court of North Carolina, unanimous on this issue, analyzed this Court's cases and reached the same conclusion in *State* v. *Jackson*, 343 S.E.2d 814, 825-826 (1986) ("Those rulings which can be said to substantially affect the basic truth-finding process have generally been those which either gave an accused the ability to effectively present his case * * * or those which have placed restrictions on the prosecution's ability to present improper evidence against an accused. * * * We conclude that while the ruling in *Batson* may tend to incidentally avoid unfairness in the trial, it is not one which bears substantially on the truth-finding process.").

tion that *Batson* has a fundamental impact on the truthfinding function. In *DeStefano* v. *Woods*, 392 U.S. 631 (1968) (per curiam), the Court declined to give retroactive effect to *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), which held that the states cannot deny a request for a jury trial in serious criminal cases, and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), which extended the right to jury trials for serious criminal contempts. It certainly cannot be said that those decisions lacked impact on the truthfinding function. As petitioner notes (Br. 15), the decision in *Duncan* was intended as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge" (391 U.S. at 156); and the purpose of the jury trial guarantee generally is to "prevent[] miscarriages of justice" and "assur[e] that fair trials are provided" (*id.* at 158). Nonetheless, the Court held that *Stovall* did not require retroactive application of the new rules. Because there was no suggestion that trials without juries were inevitably unfair, the Court concluded that it was not necessary to require new trials for all persons who had been convicted under procedures inconsistent with the Sixth Amendment right to jury trial. *DeStefano*, 392 U.S. at 633-634.

Several years after *DeStefano*, the Court decided in *Gosa* v. *Mayden*, 413 U.S. 665 (1973), not to give retroactive effect to *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). In *O'Callahan* the Court found that a person in military service charged with a crime that is not "service connected" is entitled to the constitutional protections of indictment by a grand jury and trial by jury in a civilian court. The plurality recognized that the constitutional rights at issue had an

impact on truthfinding.[17] The plurality explained, however, that an impact on truthfinding that was an improvement at the margin, rather than correction of some fundamental flaw, did not rise to the level needed to satisfy the first *Stovall* factor (413 U.S. at 680):

> [R]etroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

In language as applicable to *Batson* as to *O'Callahan*, the plurality held that the first *Stovall* factor did not favor retroactivity because "[n]othing said in *O'Callahan* indicates that the major purpose of that decision was to remedy a defect in the truth-determining process" (413 U.S. at 682).[18]

Subsequently, in *Daniel* v. *Louisiana*, 420 U.S. 31 (1975) (per curiam), the Court declined to accord

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[17] "It * * * would demean the constitutional rights to indictment and trial by a jury to assert that those guarantees do not play some role in assuring the integrity of the truth-determining process" (413 U.S. at 681 (plurality opinion)).

[18] See also *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977) (emphasis added by the Court) ("'"[w]here the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truthfinding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule [is] given complete retroactive effect"'") (quoting *Ivan V.* v. *City of New York*, 407 U.S. 203, 204 (1972) (per curiam) (quoting *Williams*, 401 U.S. at 653 (plurality opinion))); *Reed* v. *Ross*, 468 U.S. 1, 5 (1984) (same).

retroactive application to *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). In *Taylor*, this Court held that the exclusion of women from jury venires violates the Sixth and Fourteenth Amendment requirement that petit juries be selected from a source fairly representative of the community. Although it was a Sixth Amendment decision, *Taylor* was very similar to *Batson* in purpose and effect.[19] Indeed, *Taylor* is the case on which amici rely for their theory that representation of diverse viewpoints is necessary to a "political" component of the jury's truthfinding function (Br. 13-14). The Court observed that *Taylor*, like *Duncan*, was "concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression" (*Daniel*, 420 U.S. at 32). But *Taylor*, like *Duncan*, "did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in

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[19] First, in both *Taylor* and *Batson*, the Court observed that the jury safeguards an accused against the arbitrary exercise of power by prosecutor or judge (*Taylor*, 419 U.S. at 530; *Batson*, slip op. 6). Second, in both *Taylor* and *Batson* the Court relied on the fact that community participation is critical to public confidence in our system of justice (*Taylor*, 419 U.S. at 530; *Batson*, slip op. 6). Third, despite its moorings in the Sixth Amendment, *Taylor* overruled a prior decision upholding exclusion of women from juries against an Equal Protection Clause challenge (*Hoyt* v. *Florida*, 368 U.S. 57 (1961)), and the Court plainly brought traditional equal protection principles to bear on the problem in the course of holding that more than a rational basis was required for systematic exclusion on the basis of gender of 53% of the citizens eligible for jury service (see generally 419 U.S. at 531-535 & nn.15-17). *Batson*, of course, was rooted in the proposition that the Equal Protection Clause does not permit the state to make judgments about jurors on the basis of their race (see slip op. 17).

accordance with what we determined to be the requirements of the Sixth Amendment" (*ibid.*). Therefore, despite the reliability-enhancing aspect of *Taylor*, the Court held that the first *Stovall* factor did not favor retroactivity.

These principles apply directly to this case. Even on the assumption that *Batson* has increased the reliability of jury verdicts, the Court has not suggested (and petitioner and amici do not contend) that trials conducted under the *Swain* rules necessarily resulted in a jury that could not fairly judge the case.[20] In sum, it is difficult to see how the right announced in *Batson* could have more of an effect on the truth-

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[20] Just five days after *Batson*, the Court observed in another context that "an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'" *Lockhart* v. *McCree*, No. 84-1865 (May 5, 1986), slip op. 14 (quoting *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 10). There is no reason to presume that pre-*Batson* juries failed this test of impartiality. *Batson* did not correct procedures that could result in the inclusion of jurors who could not fairly judge a defendant. Cf. *Turner* v. *Murray*, No. 84-6646 (Apr. 30, 1986). The procedures changed in *Batson* were altered because they might result in the exclusion through peremptory challenges, on the basis of race, of jurors who could judge a defendant just as fairly as other jurors. As in *Lockhart*, the jurors selected under the *Swain* procedures in any particular case "could have ended up on the jury through the 'luck of the draw'" (*Lockhart*, slip op. 14), and there would have been no basis to question their ability to adjudge guilt and innocence impartially. And the impartiality of past juries is not called into question just because empirical studies might show that some decisions might have been different if there had been minority representation on those juries (see Br. of Amici Curiae 19-24). Such studies fall far short of demonstrating that juries without minority representation decide cases unfairly, just as it was insufficient in *Lockhart* to show through empirical studies that one type of jury was more "conviction-prone" than another (*Lockhart*, slip op. 9).

finding function than the rights announced in *Duncan*, *O'Callahan*, and *Taylor*.

The case on which petitioner and amici principally rely is entirely consistent with this analysis and does not support retroactivity for *Batson*. In *Brown* v. *Louisiana*, 447 U.S. 323 (1980), the Court gave retroactive effect to the rule in *Burch* v. *Louisiana*, 441 U.S. 130 (1979), that a conviction by only five members of a six-person jury violates the Sixth Amendment jury trial guarantee. The plurality confirmed that rules that "marginally implicate the reliability and integrity of the factfinding process" or " 'tend[] incidentally' to avoid unfairness" need not be given retroactive effect, especially if they are "designed primarily to foster other, equally fundamental values in our system of jurisprudence" (447 U.S. at 329 (quoting *Gosa* v. *Mayden*, 413 U.S. at 680 (plurality opinion)).[21] But the rule in *Burch* did not fit

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[21] In a footnote, the plurality quoted some of the formulations from past cases of the standard for determining whether a rule had a sufficiently fundamental impact on truthfinding to meet the first *Stovall* test (*Brown*, 447 U.S. at 329 n.6). Despite amici's claim that the jury's judgment is not "limited to the binary alternatives of 'guilt' or 'innocence' " (Br. 13), the cases quoted in the *Brown* footnote make it abundantly clear that, whether or not the jury's function is so limited, it is the determination of guilt and innocence that concerns this Court when it decides whether to give retroactive effect to a new constitutional decision. See, *e.g.*, *Johnson* v. *New Jersey*, 384 U.S. at 728 (referring to " 'clear danger of convicting the innocent' " (citation omitted)); *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (referring to "serious risk that the issue of guilt or innocence may not have been reliably determined"); *Williams*, 401 U.S. at 655 n.7 (plurality opinion) (referring to "likelihood that the results of a number of those trials were factually incorrect"); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 724 (1971) (referring to "significant

that mold. The rule in *Burch* resulted from a line-drawing process in which the Court had to choose some minimum number of jurors whose concurrence was necessary in order for a conviction to be deemed a fair result of the proper functioning of the jury. See *Burch*, 441 U.S. at 136-138. No other constitutional values were at stake. Because "*Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict" (*Brown*, 447 U.S. at 334), and imposed the constitutional requirement on no other basis, the requirement "fundamentally implicate[d] 'the fairness of the trial—the very integrity of the fact-finding process' " (*ibid.* (quoting *Linkletter*, 381 U.S. at 639)).[22]

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chance that innocent men had been wrongfully punished in the past"); *Michigan* v. *Payne*, 412 U.S. 47, 61-62 (1973) (Marshall, J., dissenting) (referring to "a rule that was central to the process of determining guilt or innocence").

[22] The plurality distinguished *DeStefano* and *Daniel* because *Duncan* v. *Louisiana*, *supra*, and *Taylor* v. *Louisiana*, *supra*, did not rest on the premise that trials held before a judge alone or a jury from which women were systematically excluded are necessarily unfair (*Brown*, 447 U.S. at 335 n.13). Because *Burch* decided the number of jurors whose concurrence was constitutionally required to make a verdict fair, it necessarily did rest on the premise that every criminal verdict rendered by a nonunanimous six-person jury was unfair. The *Brown* plurality also distinguished *DeStefano* because *DeStefano* involved the existence of other safeguards to the factfinding process and because states denying jury trials before *Duncan*, unlike states permitting nonunanimous six-person jury verdicts before *Burch*, had acted in justifiable reliance on earlier opinions of the Court (*ibid.*). In these respects as well, *Batson* resembles *Duncan* and *Taylor* far more than *Burch*.

Batson is not at all like *Burch*. It is not a case in which the Court recognized that a line must be drawn somewhere between that which can be deemed reliable and fair and that which cannot. As the Court noted in *Allen* v. *Hardy*, *supra*, *Batson* is a case in which the new rule may be said to have some incidental, marginal impact on the truthfinding process but was primarily designed to foster other, equally fundamental values, such as the right of citizens to participate as jurors without exclusion on the basis of race. *Brown* v. *Louisiana* specifically preserves the rules that make such a decision nonretroactive. Therefore, under the analysis employed in *Brown*, as well as in *DeStefano*, *Gosa*, and *Daniel*, the first *Stovall* factor does not favor retroactivity.

***2. Prosecutors, Trial Judges, and Appellate Courts Justifiably Have Relied on the Standard of* Swain**

This Court has already recognized in *Allen* v. *Hardy* that "[t]he rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent" (slip op. 3) and that "[t]here is no question that prosecutors, trial judges, and appellate courts throughout our state and federal systems justifiably have relied on the standard of *Swain*" (*id.* at 5 (footnote omitted)). Nothing more need be said in order to decide that the second *Stovall* factor strongly disfavors retroactivity.

Petitioner and amici, however, invite the Court to revisit this holding. Their argument suggests that *Swain* condemned as a violation of equal protection the use of peremptory challenges on the basis of race even in the individual case, but that it created a crippling burden of proof for those who sought to prove such a violation. Therefore, they argue, a prosecutor who took race into account in the exercise of

his peremptory challenges in any case was unreasonably and in bad faith violating a constitutional right, but his conduct was insulated from review under *Swain*'s evidentiary burden (Pet. Br. 18-19; Br. of Amici Curiae 26-28). For that reason, they contend that any reliance on *Swain* as a basis to consider race in the exercise of peremptory challenges was unjustifiable.

This argument is gravely flawed. But even if there were merit to the argument, it would be insufficient to overcome the legitimate reliance on *Swain* by lower courts, whose good faith has not been called into question. It is those courts, not just prosecutors, who would have to face the burdens of hearings into prosecutors' motivation for the exercise of peremptory challenges. And, in the typical case where "the prosecutor, relying on *Swain*, would have had no reason to think * * * an explanation would someday be necessary" (*Allen* v. *Hardy*, slip op. 5), prosecutors will be unable to rebut any prima facie case made out by defendants, and a new trial will be necessary. The burdens of new trials will fall on the lower courts that justifiably relied on *Swain*, not just on the prosecutors whose good faith petitioner and amici question.

Apart from the reliance on *Swain* by the lower courts, we submit that it was reasonable for prosecutors to read *Swain* to permit the exercise of peremptory challenges on the basis of race as long as the prosecutor did not challenge jurors of a particular race "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be" (*Swain*, 380 U.S. at 223). It may now appear that that reading of *Swain* was incorrect, but that is not the point. All that is re-

quired to satisfy the second *Stovall* criterion is that, before *Batson*, it was reasonable to read *Swain* in that manner. See, *e.g.*, *Reed* v. *Ross*, 468 U.S. 1, 17 (1984) (quoting *Johnson*, 457 U.S. at 551) (clear break occurs when Court " 'disapprov[es] a practice this Court arguably has sanctioned in prior cases' "); *Adams* v. *Illinois*, 405 U.S. 278, 283 (1972) (plurality opinion) (reliance on inference of law that is "not unreasonable in light of our decisions" suffices to meet the second *Stovall* criterion).

The Court in *Swain* rejected the claim that the use of peremptory challenges to strike blacks in the case before the Court violated the Equal Protection Clause. In rejecting the equal protection argument, the Court explicitly found "merit in th[e] position" that the peremptory challenge system, "in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants, or those with blue eyes" (380 U.S. at 212). In language that hardly connoted disapproval, the Court observed the frequent exercise of the peremptory challenge on the basis of "race, religion, nationality, occupation or affiliations of people summoned for jury duty" (*id.* at 220 (footnote omitted)) and stated that jurors "are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried" (*id.* at 221). The Court explained that "veniremen are not always judged solely as individuals," because "the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be" (*id.* at 220-221 (footnote omitted)). In a conclusion that could not have been more unequivocal,

the Court stated, "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws" (*id.* at 221). The reader of that portion of the opinion in *Swain* could only be left with the impression that the Court did not consider it purposeful discrimination to use peremptory challenges on the basis of "group affiliations," such as race, in the context of the case to be tried.[23]

In a separate section of the opinion, the Court in *Swain* then considered "a broader claim" (380 U.S. at 222) that "raise[d] a different issue and [might] well require a different answer" (*id.* at 223). That claim was that it violated the Equal Protection Clause for the prosecutor to strike black jurors "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim may be" (*ibid.*). The Court declined to decide whether there was an equal protection violation even in that case because "even if a State's systematic striking of Negroes in the selection of petit juries raises a prima facie case under the Fourteenth Amendment, * * *

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[23] Amici conceded the reasonableness of this interpretation of *Swain* in their brief in *Batson* (see Br. *Amici Curiae* of the NAACP Legal Defense and Educational Fund, Inc., the American Jewish Committee, and the American Jewish Congress at 48-49 ("the prosecutor who is conscientious in his desire to obey the Constitution nevertheless sees nothing unconstitutional about peremptorily challenging blacks *qua* blacks in particular cases, so long as he does not do it in all cases")). Other amici in *Batson* conceded not only that that reading of *Swain* was reasonable, but that it was the correct interpretation of the case (Br. of Michael McCray, the New York Civil Liberties Union, and the American Civil Liberties Union as *Amici Curiae* at 36 ("*Swain* * * * hold[s] that the disqualification of blacks from criminal juries on racial grounds is not discrimination")).

the record in this case is not sufficient to demonstrate that the rule has been violated" (*id.* at 224).[24] As one basis for its holding that the record was insufficient, the Court noted the prosecutor's statement that "striking is done differently depending on the race of the defendant and the victim of the crime" and indicated that that statement did not "support an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations" (*id.* at 225-226).

Batson stands for the proposition that the Court was wrong in *Swain* to treat the race of a juror as a legitimate trial-related consideration in the exercise of peremptory challenges in individual cases.[25]

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[24] Several analyses of *Swain* have focused on its failure to hold even that systematic exclusion of blacks was an equal protection violation. See, *e.g.*, *United States* v. *Newman*, 549 F.2d 240, 248 (2d Cir. 1977); *United States* v. *Pearson*, 448 F.2d 1207, 1215 & n.17 (5th Cir. 1971); *People* v. *Wheeler*, 22 Cal. 3d 258, 284, 583 P.2d 748, 766-767, 148 Cal. Rptr. 890, 907-908 (1978); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 289 & n.221 (1968).

[25] The Court in *Batson* held that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race" (slip op. 17). As the Court observed in *Swain*, however, a prosecutor's exercise of peremptory challenges against jurors of the same race as the defendant is not based on an assumption or intuitive judgment that "a juror of a particular race or nationality" *would* be partial, but on the assumption or intuitive judgment that "one from a different group is *less likely* to be" (380 U.S. at 221 (emphasis added)). We take *Batson* to mean that a prosecutor's verbatim recitation of the *Swain* explanation for the use of peremptory challenges on the basis of race would not be sufficient to rebut a prima facie

But nothing in *Batson* makes it unreasonable for a reader of *Swain* to have concluded that peremptory challenges could be exercised on the basis of race in individual cases.

Despite the language of *Swain*, petitioner and amici read *Swain* to mean only that the use of peremptory challenges was shielded from judicial inquiry by a presumption of regularity, not that the use of peremptory challenges to strike jurors of a particular race in an individual case did not violate equal protection principles. They would have the Court believe that only an unreasonable prosecutor acting in bad faith would read *Swain* to hold that the exercise of peremptory challenges on the basis of race does not violate equal protection principles. That claim is easily met. Members of the Court itself have described the holding of *Swain* in the manner we suggest, and throughout the past 20 years commentators and courts whose good faith is not open to question have read *Swain* to hold that the exercise of peremptory challenges on the basis of race does not violate equal protection principles.

In *McCray* v. *New York*, 461 U.S. 961 (1983) (denial of certiorari), the dissenting Justices characterized *Swain* as holding "that the prosecutor's use of peremptory challenges to strike Negroes from the jury panel in one particular case did not deny the defendant the equal protection of the laws" (461 U.S. at 964). In *Gilliard* v. *Mississippi*, 464 U.S. 867 (1983) (denial of certiorari), the dissenting Justices recited the holding of *Swain* that "the prosecution is free to use peremptory challenges to remove Negroes from the jury in any given case so long as the prose-

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case. If we are right, then *Batson* overruled a critical holding of *Swain* that had nothing to do with burdens of proof.

cution does not remove Negroes from juries 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim' " (464 U.S. at 870 (quoting *Swain*, 380 U.S. at 223)). The dissenters noted the view of "at least 19 jurisdictions" that "the exclusion of Negroes by peremptory challenges is constitutional in the absence of evidence of systematic exclusion" (464 U.S. at 871 (footnote omitted)). And in *Thompson* v. *United States*, No. 83-6809 (Nov. 13, 1984) (denial of certiorari), the dissenters stated that *Swain* "authorizes the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race" (slip op. 3-4) and added that *Swain*'s "rule, if without other virtue, was at least clear" (*id.* at 5). Surely no prosecutor can be faulted for agreeing with the statements of these Justices that *Swain* adopted a clear, substantive Fourteenth Amendment rule that permitted consideration of race in the exercise of peremptory challenges, and that *Swain* did not simply establish a burden of proof for finding an equal protection violation.[26]

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[26] Nor could a prosecutor be faulted for believing that an interpretation of *Swain* that the Court declined to review was still good law, even in the face of "flag[s] * * * [that] warned that [*Swain*] was in stormy weather" (*Linkletter*, 381 U.S. at 637; see also pp. 12-15, *supra*). Like the admission of illegally seized evidence (see *Linkletter*), prosecutorial comment on defendant's exercise of Fifth Amendment rights (see *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966)), wiretaps conducted without probable cause (see *Desist*), denial of the right to jury trial in serious criminal cases (see *DeStefano*), and systematic exclusion of women from petit juries (see *Daniel*), the practice permitted by *Swain* may now seem profoundly wrong to a majority of the Court. That is true of any decision that the Court overrules. See Haddad, *supra* note 7,

Lower courts and commentators, including both proponents and critics, have consistently read *Swain* to permit consideration of race in the exercise of peremptory challenges, as a matter of substantive constitutional law. One of the earliest law review commentaries on *Swain* declared that it "held that the use of peremptory challenges to exclude Negroes from the jury in a particular case was permissible regardless of the prosecutor's motives." *The Supreme Court, 1964 Term*, 79 Harv. L. Rev. 56, 135 (1965); see also Note, *Fair Jury Selection Procedures*, 75 Yale L.J. 322, 322-323, 325 (1965); Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338, 347 (1966). Another thoughtful and highly critical commentary explored the possibility that *Swain* had merely set a burden of proof insulating peremptory challenges from review, but concluded that "the majority was willing to accept the respective races of the defendant and the victim of the crime as constituting, without more, [acceptable] considerations [related to the case]" (Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 Va. L. Rev. 1157, 1169 n.42 (1966)).

An author who was sharply critical of *Swain* in every respect expressed a similar understanding, stating that the *Swain* Court "adhered to the view

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60 J. Crim. L., Criminology & Police Sci. at 429 ("the Supreme Court must damn with vehemence an old rule when it raises a new safeguard to the level of a constitutional right"). But the Court's retroactivity decisions have never departed from the principle that government officials may legitimately rely on a decision of the Court, however "wrong," until it is overruled.

that * * * [use of the peremptory challenge] against members of groups suspected of sympathy with the adverse party was common, legitimate, and beyond the reach of equal protection" (Kuhn, *supra* note 24, 41 S. Cal. L. Rev. at 285 (footnote omitted)). "For example, where the defendant is Negro, the prosecution may remove Negro veniremen out of fear for their sympathy for the defendant" (*id.* at 284 (footnote omitted)). *Swain* was seen to permit removal of black jurors through peremptory challenge "in cases where, as a group, they may be considered potentially sympathetic to the defense" (*id.* at 293). A 1982 article supporting *Swain* reached the same conclusion about the proper interpretation of the Court's equal protection analysis. Saltzburg & Powers, *Peremptory Challenges And The Clash Between Impartiality And Group Representation*, 41 Md. L. Rev. 337, 345 (1982) (The *Swain* Court "recognized two possible motives for exercising challenges against black jurors. The first—the use of race as a proxy by which to identify probable prejudice in a particular case—was explicitly approved by all the [J]ustices, except Justice Black who concurred in the result without opinion.").[27]

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[27] Numerous other law review commentators have read *Swain* to permit the exercise of peremptory challenges in individual cases on the basis of race. See, *e.g.*, Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 Loy. L.A.L. Rev. 247, 269-270 (1973); Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1667 (1985); Note, *Systematic Exclusion of Cognizable Groups by Use of Peremptory Challenges*, 11 Fordham Urban L.J. 927, 934 (1983); Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 Hastings L.J. 1417, 1431 (1969); Comment, *The Sixth Amendment: Limiting the Use of Peremptory Challenges*, 16 J. Mar. L. Rev. 349, 350 (1983); Comment, *The*

In 1977, a "black-letter" commentary on *Swain* and the federal and state cases that followed it declared that the Court had "held that a prosecutor's use of the peremptory challenge in a single case to remove blacks from the venire was not a violation of the Constitution" (Annot., 79 A.L.R.3d 14, 18 (1977)). The annotation listed *Swain* itself, 23 federal cases, and 101 state cases (*id.* at 27-32) said "to support the proposition that the use of the peremptory challenge against members of a race or class in a single case does not violate the defendant's constitutional rights" (*id.* at 27).[28] In practice suggestions for defense counsel, the annotation advised that "it is essential to remember that the Supreme Court, in the Swain decision, has recognized that under the appropriate circumstances the race or class of prospective jurors is a trial-related consideration and thus an appropriate basis for the exercise of the peremptory challenge" (*id.* at 24-25).

Finally, several federal courts of appeals in the last two years have examined *Swain* closely, and none of them has read *Swain* as petitioner and amici do.[29]

Prohibition of Group-Based Stereotypes in Jury Selection Procedures, 25 Vill. L. Rev. 339, 340 (1980); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1721-1722, 1724 (1977); Case Comment, 21 Am. Crim. L. Rev. 477, 483 (1984); Casenote, 21 B.C.L. Rev. 1197, 1201, 1202-1203 (1980).

[28] The 1986 supplement to that annotation lists another seven federal and 68 state cases in support of the same proposition (79 A.L.R.3d 3-4 (Supp. 1986)).

[29] Before *Batson*, there were to our knowledge no federal judges and only one state-court judge who had actually

Several, including at least one court that upheld a Sixth Amendment claim, have agreed that *Swain* permitted the exercise of peremptory challenges on the basis of race in an individual case. The most thorough examination of *Swain* may be found in a decision rendered just two months before *Batson* by the en banc Fifth Circuit (*United States* v. *Leslie*, 783 F.2d 541 (1986), petition for cert. pending, No. 85-1961). With 11 judges concurring, the Fifth Circuit stated, after exhaustive quotation and analysis of Swain, that the Court had made it clear that race or other group affiliation is a legitimate ground for challenge in an individual case (783 F.2d at 548). Five judges dissented from the majority's decision not to require inquiry into peremptory challenges under the supervisory power, but none disputed the majority's interpretation of *Swain*. To like effect are *Booker* v. *Jabe*, 775 F.2d 762, 766 (6th Cir. 1985) (quoting *Swain*, 380 U.S. at 221) ("under *Swain* jurors may be excused on the basis of 'their group affiliations,' including race, religion, and sex"), and *United States* v. *Clark*, 737 F.2d 679, 682 (7th Cir. 1984) (*Swain* held "that it is not a denial of the equal protection of the laws for a prosecutor to base peremptory challenges on racial grounds, provided that he is not doing so in pursuance of a systematic policy of racial exclusion from juries"). See also *McCray* v. *Abrams*, 750 F.2d 1113, 1123-1124 (2d Cir. 1984), vacated and remanded, No. 84-1426 (June 30, 1986); *id.* at 1137, 1138 (Meskill, J., dissenting); *United States* v. *Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), cert. denied, No. 83-6809 (Nov. 13, 1984).

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adopted petitioner's reading of *Swain*. *State* v. *Wiley*, 144 Ariz. 525, 545-546, 698 P.2d 1244, 1263-1264 (1985) (Feldman, J., specially concurring).

In sum, as the Court noted in *Allen* v. *Hardy*, prosecutors and lower courts have reasonably interpreted *Swain* to permit the exercise of peremptory challenges on the basis of race in an individual case. In light of the reasonableness of that interpretation and the consequent reliance on that reading of *Swain*, the second *Stovall* factor—"the extent of the reliance by law enforcement authorities on the old standards" (388 U.S. at 297)—strongly favors holding *Batson* nonretroactive.

3. *Retroactive Application of the* Batson *Rule, Even on Direct Review, Would Seriously Disrupt the Administration of Justice*

In *Allen* v. *Hardy*, this Court applied the third *Stovall* factor and concluded that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice" (slip op. 5). The concerns expressed there would likewise be applicable, albeit not to the same degree, to the administration of justice if the rule in *Batson* should be applied retroactively to cases pending on direct appeal at the time it was decided. It would obviously be highly disruptive to remand every case not yet final in which the defendant has alleged that the prosecutor exercised peremptory challenges in a discriminatory manner. On remand, the district court would be required first to reconstruct the surrounding circumstances to determine whether the defendant's proof made out a prima facie case. And, even if the lower courts were able to reconstruct events to that extent, the prosecutor would have to recall why he made a decision, sometimes several years earlier, that most probably was intuitive in the first place. The Court expressed this concern in *Allen* v. *Hardy* (slip op. 5):

> Where a defendant made out a prima facie case, the court then would be required to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in virtually every case since the prosecutor, relying on *Swain*, would have had no reason to think such an explanation would someday be necessary.

As a result, many convictions would have to be vacated, and retrials would be hampered by the passage of time (*ibid.*).

The need for an evidentiary hearing in every case (except those in which the prosecutors' unexplained actions are so clearly "nondiscriminatory" as to call for no explanation) is extremely important under this Court's retroactivity cases. The administration-of-justice criterion was conceived in *Stovall* as a qualitative factor at least as much as a quantitative one. The Court relied (388 U.S. at 300) on the fact that hearings would have to be held, with problems of "unavailability of witnesses and dim memories," in holding that the lineup cases were not retroactive.

On a quantitative level, the truism that retroactivity on direct review will affect fewer cases than retroactivity on collateral review cannot suffice to reverse this Court's conclusion in *Allen* v. *Hardy*, unless the Court is prepared to hold all new constitutional decisions retroactive on direct review. In any event, we note that there are at least seven federal cases pending in this Court on direct review raising *Batson* issues.[30] Those cases demonstrate the

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[30] *Orji* v. *United States*, No. 84-6732; *Tolliver* v. *United States*, No. 85-1663; *Leslie* v. *United States*, No. 85-1961; *Evans* v. *United States*, No. 85-6549; *Grandison* v. *United States*, No. 85-6645; *Kelly* v. *United States*, No. 86-5095; *Allen* v. *United States*, No. 86-5255.

fallacy of amici's suggestion (Br. 31) that the impact of retroactivity will be significantly mitigated because of the failure of litigants to preserve a *Batson* issue, for the preservation *vel non* of a *Batson* issue has already become a subject of dispute in many of those cases,[31] and extensive litigation over that question may be expected if *Batson* is held retroactive. There are undoubtedly many more such cases pending in the courts of appeals, which, like this Court, presumably have held such cases pending the decisions in *Batson* and in this case. We have not attempted to ascertain the number of state cases in which convictions could be upset if *Batson* were held retroactive, but that number is surely much larger than the number of federal cases. For those reasons, retroactivity will have a significant negative impact on the administration of justice—the third *Stovall* factor—even if retroactivity is limited to cases on direct review.

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[31] For example, in Nos. 85-6549 and 85-6645, the petitions raise only a Sixth Amendment issue, but petitioners claimed entitlement to the benefit of *Batson* in supplemental filings. In No. 85-1961, petitioner claims (Pet. 7 n.1) that he "reserve[d]" constitutional issues for this Court's review, but the only judges in the court of appeals to comment on the matter had suggested the opposite (*United States* v. *Leslie*, 783 F.2d at 566 (Williams, J., dissenting) ("the constitutional issue of *Swain* was not even raised by the defendant in this case")).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Nos. 85-5221 & 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

WILLIE DAVIS BROWN
a/k/a WILL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Writs of Certiorari to the Supreme Court of Kentucky and the Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) respectfully moves the Court, pursuant to Rule 36.3, for leave to file the attached brief as amicus curiae in support of the Petitioners.

Petitioners have consented to the filing; Respondent, State of Kentucky, has consented; Respondent, United States of America, has consented but no written consent has been received to date.

The NACDL is a District of Columbia non-profit corporation with a membership comprised of approximately four thousand lawyers, including representatives from every state.

NACDL was founded twenty-eight years ago to promote study and research in the field of criminal law, to disseminate and

advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

An integral part of the proper administration of criminal justice is the application of principles and procedures announced by the Court to cases other than that before the Court at that particular time. At present the question of when the Court's decisions will apply to other cases is difficult to answer. The issue of retroactivity has been addressed by the Court on numerous occasions, but no line has been drawn by which to judge whether a

ruling is retroactive or not. A clear answer is needed on the issue to provide the guidance needed by the lower courts and counsel to administer the criminal justice system properly. The NACDL wishes to file this brief to suggest that these cases present an appropriate opportunity to resolve the issue of retroactivity and to do so in favor of Petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The NACDL is a District of Columbia non-profit corporation with a membership comprised of approximately four thousand lawyers, including representatives from every state.

NACDL was founded twenty-eight years ago to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

An integral part of the proper administration of criminal justice is the application of principles and procedures announced by the Court to cases other than that before the Court at that particular time. At present the question of when the Court's decisions will apply to other cases is difficult to answer. The issue of retroactivity has been addressed by the Court on numerous occasions, but no line has been drawn by which to judge whether a ruling is retroactive or not. A clear answer is needed on the issue to provide the guidance needed by the lower courts and counsel to administer the criminal justice system properly.

SUMMARY OF ARGUMENT

The cases before the Court present the recurring issue of retroactivity of a prior decision. When the Court ruled in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712 (1986), Petitioners herein had applied for writs of certiorari on the question of use of peremptory challenges. The Court must now decide whether the procedure clarified in Batson is applicable to convictions not yet final. The NACDL submits that it is.

As early as 1801 the Court recognized that the general rule in reviewing a case on direct appeal is to look to the law as it exists at the time of review. United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed 49 (1801). In Desist v. United States, 394 U.S. 244 (1969), Justice Harlan, in a dissenting opinion, proposed a view towards the issue of retroactivity

that has since become known as the Harlan approach. The basis of that approach is that application of a new rule of law to cases pending on direct review is necessary to avoid the Court acting as a super-legislature. For the limited purpose of deciding the cases before it, the Court adopted Harlan's reasoning in United States v. Johnson, 457 U.S. 537 (1982) and Shea v. Louisiana, 105 S.Ct. 1065 (1985). Beyond that, the Court has declined to draw the line specifically between cases on direct appeal and those on habeas review, yet such a distinction would be well founded. See: Linkletter v. Walker, 381 U.S. 618 (1965). The scope of review is different at the two levels. Furthermore, the need for finality has long been recognized and the completion of the direct appeal process marks that ending point. See: Shea v. Louisiana, supra.

Petitioners similarly situated should receive the same treatment. Principles of fairness prevail only when all of those whose cases are on appeal feel the effects of a ruling, not just the one whose case was selected for review. Furthermore, justice demands that if a lower court is reversed by the Court for reaching a decision that was wrong, other courts that reach the same decision, if still subject to review, must likewise be reversed. See: U.S. v. Johnson, 457 U.S. 537 (1982); Mackey v. U.S., 401 U.S. 667 (1971) (J. Harlan opinion); Desist v. U.S., 394 U.S. 244 (1969) (J. Harlan dissent).

A R G U M E N T

I. A CLEAR LINE OF RETROACTIVITY IS MANDATED AND JUSTIFIABLE FOR THOSE CASES PENDING ON DIRECT APPEAL.

Retroactivity of judicial decisions is neither compelled nor prohibited by the Federal Constitution. However, "[a]s a rule, judicial decisions apply 'retroactively.'" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 1341 (1984), quoting from Robinson v. Neil, 409 U.S. 505, 507-508 (1973). Varying degrees of retroactivity have been established as a result of the innumerable cases in which the Court has addressed the issue. New decisions have been given complete retroactive application to all prior cases or limited application only to those where the judgment is not yet final, or those where the trial has not yet begun.

The difference between the scope of review on direct appeal and collateral review has long been recognized. In U.S. v. Schooner Peggy, 1 Cranch 103, 110 (1801), Chief Justice Marshall wrote:

> It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. . . [and] where individual rights... are sacrificed for national purposes. . .the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

With regard to cases on collateral review ("habeas cases"), the Court should apply the constitutional standards that prevailed at the time the original proceeding took place. "[C]orrect application of...

that existing law] is all that is required to 'forc[e] trial and appellate courts... to toe the constitutional mark.' [Mackey v. U.S., 401 U.S. 667 at 687.]" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338 at 1347, (J. Powell concurring). As noted by Justice Powell in his concurrence in Hankerson v. North Carolina, 432 U.S. 233, 248 (1977), such an approach is "more attuned to the historical limitations on habeas corpus." See also: Solem v. Stumes, supra, (J. Powell concurring).

The distinction between direct and collateral review was most recently discussed in Shea v. Louisiana, 105 S.Ct. at 1070, wherein the Court stated:

> The distinction. . .properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere the closing must come.

It might seem that a dim line has been drawn between cases on direct appeal and on collateral review. However, numerous decisions rendered on the issue of retroactivity have generated "a welter of incompatible rules and inconsistent principles." U.S. v. Johnson, 457 U.S. at 546, quoting from Desist v. U.S., 394 U.S. 244, 258 (J. Harlan dissenting). Even the criteria for determining at what point to draw the line appears to differ according to the stage of litigation of the case at issue. In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court established the following three factors to consider:

> (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards.

Those factors were discussed in Solem v. Stumes, 465 U.S. 638 (1984), wherein the Court held that Edwards v. Arizona was not retroactive to cases on collateral review. The Court in Solem also referred to Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. Shott, 382 U.S. 406 (1966); and Johnson v. New Jersey, 384 U.S. 719 (1969). It is significant that each of those cases arose on collateral review. U.S. v. Johnson, supra, and Shea v. Louisiana, supra, which both came before the Court on direct appeal, addressed different factors. In each, the Harlan approach was employed, calling for application of the decision to all cases that had not reached the end of the appeal process -- finality. Though the Court has never clarified specifically what factors are to be considered in a specific type of case, a review of all of the cases shows that the Stovall v. Denno, supra, factors apply

to cases at the habeas level, whereas the Harlan approach has been applied to cases on direct appeal. This distinction was noted by District of Columbia Court of Appeals in Kirk v. U.S., (No. 85-804, June 5, 1986). Furthermore, the Stovall factors bear more practically on habeas cases because they usually involve long-standing convictions, thus the issues of reliance and effect on the system weigh much heavier.

Two exceptions to the Harlan approach have been recognized. Decisions which indicate a clear break from the past are invariably non-retroactive, and where a new decision bears on the trial court's lack of authority to convict or punish the defendant, it is to be applied retroactively to all cases. If the decision before the Court on the question of retroactivity does not fit into one of those categories

where retroactivity has already been decided, the Harlan general rule is considered.

In the dissents written in Shea v. Louisiana, supra, including one written by Justice Rehnquist, disfavor was expressed over drawing the line between direct appeal and habeas, but with exceptions. Specifically, the exception for "clear break" decisions was questioned. Such an exception does allow for continued inconsistency in the area of retroactivity. There is no definite criteria for determining when a decision marks a clear break from the past. In Solem v. Stumes, the Court held that, while Edwards v. Arizona did create a new "bright-line" rule, it was "not the sort of 'clear break' case that is almost automatically retroactive. 104 S.Ct. at 1343. What distinguishes a "bright-line" new rule from a "clear break"? This question remains unanswered.

It is clear that the time has come to draw a distinct line with respect to retroactivity. Embracing the Harlan approach to cases on direct appeal would make such a mark. Adoption of the approach without the "clear break" exception would clarify the muddy waters that, though lessened, are still muddled with the issue of clear break left open.

II. PRINCIPLES OF FAIRNESS AND JUDICIAL CONSISTENCY MANDATE APPLICATION OF A NEW RULE TO ALL CASES PENDING ON DIRECT REVIEW.

Petitioners' cases were pending before the Court on applications for writ of certiorari when the Court ruled in Batson v. Kentucky, supra. The issue addressed in Batson, the use of peremptory challenges by a prosecutor, had been raised in both applications. Petitioners convictions were not final. Their cases should be reviewed in light of the procedures outlined in Batson.

Justice Harlan based his approach on retroactivity on notions of "principled decision-making and fairness." Shea v. Louisiana, 105 S.Ct. at 1070. He recognized that convictions are not overturned and criminals released from jail because of the Court's desire to do so or because it seems wise. Such action is taken because "the government has offended con-

stitutional principle in the conduct of his case." Desist v. U.S., 394 U.S. at 258. That basic judicial tradition is abandoned when the Court simply picks and chooses one defendant from among several similarly situated and applies the "new" rule only to him. Justice Powell also addressed this problem also in his concurring opinion in Hankerson v. North Carolina, supra. Allowing one lucky individual whose case was chosen to enjoy retroactive application while others like him fell under the old doctrine "hardly comports with the ideal of 'administration of justice with an even hand.'" Id at p. 247, quoting from Desist v. U.S., supra at 255 (J. Douglas dissenting). As noted in Shea v. Louisiana, supra, in the absence of retroactive application, equal justice would prevail only if the "new" rule was confined to prospective application, unavailable even to the defendant whose

case prompted the decision. The petitioner in Batson v. Kentucky enjoys the benefit of that ruling; petitioners BROWN and GRIFFITH must likewise.

If defendants come before the Court with the same issues, justice must be done to each. In accordance with this responsibility, Justice Harlan stated:

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very argument we have embraced. Anything else would belie the truism that is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case.

Desist v. U.S., 394 U.S. at 259.

If the lower court in Batson v. Kentucky violated constitutional protection afforded under the Equal Protection Clause, the lower courts in the cases herein committed the same error. The Court, having revers-

ed the lower court in Batson, cannot now affirm decisions which reject the position embraced therein.

The approach proposed by Justice Harlan, adopted by various members of the Court in concurring and dissenting opinions and adopted by the Court for limited purposes in Johnson and Shea, is "closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine. Hankerson v. North Carolina, 432 U.S. at 246.

C O N C L U S I O N

Petitioners, who stand in the same position as the lucky beneficiary whose case is chosen for review, should benefit to the same extent as that similarly situated defendant. A clear and concise rule of retroactivity dictates that the same remedy should always apply on direct appeal.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY IN NO. 85-5221 AND TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN NO. 85-5731

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What should be the extent of the retroactive application given the decision in Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986)?

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Nos. 85-5221 and 85-5731

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

WILLIE DAVIS BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY IN No. 85-5221 AND TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN No. 85-5731

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation

* Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

organized under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights through the prosecution of lawsuits. Under its charter, the Fund renders legal aid to impoverished blacks suffering injustice by reason of race. For many years, its attorneys have represented parties and participated as amicus curiae before this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the exclusion of blacks from jury service and the impact of that practice on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions, see, e.g., Swain v. Alabama, 380 U.S. 202 (1965); Alexander v. Louisiana, 405 U.S. 625 (1972), and currently represents clients who have been affected by this practice. See, e.g., Gordon v. United States, No. 85-7726 (11th

Cir.)(pending); Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986).

The American Jewish Congress is a national organization of American Jews founded in 1918. It is concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in all areas of American life, including the administration of justice.

SUMMARY OF ARGUMENT

At the least, decision in the two cases before the Court should follow from the Court's recent retroactivity decisions, see, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38 (1985); United States v. Johnson, 457 U.S. 537 (1982), which apply new constitutional decisions to all similarly situated cases still pending on direct appeal. This approach is strongly recommended by three considerations: (1) it promotes predictability in constitutional adjudication; (2) it strikes a reasonable balance between the concerns of equity and stability; and (3) it is rooted in judicial practice with a pedigree nearly as old as the Republic itself. See United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

Amici write separately, however, to put before the Court their views concerning the broader reach of the decision last Term in

Batson v. Kentucky, 476 U.S. ___, 90 L. Ed.2d 69 (1986). The inclusion of blacks and other minorities on criminal juries is important not merely for the social values of participation, legitimacy, and nondiscrimination. A proper understanding of what juries do and how they do it leads inevitably to the conclusion that the exclusion of blacks has a direct and demonstrable impact on the actual outcomes of jury verdicts -- that is, on the truth-finding process. Thus, full retrospective application is called for.

The rule announced in Batson is not, in its own terms, a "clear break" with past law. The exclusion of potential jurors solely on the basis of their race is and was a grave constitutional wrong in which no conscientious prosecutor should have indulged -- Swain v. Alabama, 380 U.S. 202 (1965), notwithstanding. Accordingly, the good faith reliance by prosecutors on past

precedent does not weigh in favor of limited application of the decision in Batson.

Because of the nature of the sentencing decision in capital cases, involving as it does the application of value judgments to a highly discretionary decision, the exclusion of blacks and other minorities has a heightened impact on the decision-making process in those cases. Accordingly, Batson should be fully retroactive to all challenges to death sentences imposed or recommended by juries from which blacks were improperly excluded.

ARGUMENT

I. BECAUSE THE EXCLUSION OF BLACKS AND OTHER MINORITIES HAS A DIRECT IMPACT ON A JURY'S DECISION-MAKING THAT RAISES SERIOUS QUESTIONS ABOUT THE ACCURACY OF THE RESULTING VERDICT, AND BECAUSE PROSECUTORS' INVOCATION OF THE PRACTICE WAS NOT IN GOOD FAITH, THE RULE OF BATSON v. KENTUCKY SHOULD BE RETROACTIVE

"[R]esolution of the question of retroactivity [i]s not automatic[]...." Brown v. Louisiana, 447 U.S. 323, 327 (1980)(plurality opinion). "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice...." Linkletter v. Walker, 381 U.S. 618, 728 (1965). Nevertheless, amici respectfully submit that the Court should at least follow its recent practice of holding new constitutional decisions retroactive to cases not yet final. See, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38

(1985); United States v. Johnson, 457 U.S. 537 (1982); Brown v. Louisiana, supra.

Adherence to this practice serves several important values. First, it provides predictability in constitutional adjudication, avoiding the appearance of inconsistency and unfairness that results from the changing contours of retroactivity doctrine. See United States v. Johnson, 457 U.S. at 547; Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., dissenting). Second, it strikes a reasonable balance between the concerns of stability in the law, on one hand, and equity, on the other. See United States v. Johnson, 457 U.S. at 555-56.

Third, it promotes the legitimacy of the constitutional decision-making process;[1] full prospectivity creates the

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[1] A contrary approach would undermine constitutional adjudication in another way not explored in the text. Without some incentive for litigants to raise an issue that previously had been rejected by the

appearance of the judiciary "fishing one case out of the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule...." Mackey, 401 U.S. at 678-79 (Harlan, J., dissenting). Finally, it is consonant with "basic judicial

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courts, outmoded, incorrect, or inefficient rules never would be challenged. Without some incentive, it would always be too "costly," -- the issue would be displaced in the litigant's brief by other issues more likely to succeed or, at least, more likely to command the attention of an appellate court. See Jones v. Barnes, 463 U.S. 745 (1983).

Obviously, the incentive that motivates litigants to challenge such rules is the possibility of victory on appeal. A pure prospectivity rule diminishes severely that incentive by limiting to a universe of one the number of litigants who possibly may benefit from a rule change. The predictable result is a dearth of necessary challenges to outmoded doctrines and the potential ossification of the law. See Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984); Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977).

tradition...." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); see United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

It is our position, however, that the decision in Batson should be accorded full retroactive effect under the standards developed in Linkletter and its progeny.[2] In the sections that follow, we discuss the tripartite standard governing retroactivity articulated in Stovall v. Denno, 388 U.S. 293, 297 (1967),[3] as interpreted in subsequent cases.

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[2] Because the Court now has the benefit of full briefing and argument on this issue, it would be appropriate to reconsider its contrary decision in Allen v. Hardy, ___ U.S. ___, No. 85-6593 (June 30, 1986).

[3] The Stovall Court expressed the considerations as follows: "(a) the purpose to be served by the new standard; (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 297.

A. The Exclusion of Blacks from Criminal Juries Affects in Fundamental Ways the Accuracy and Reliability of the Decision-making Process

The use of peremptory challenges to remove potential jurors on the basis of their race violates core constitutional values concerning equal protection and public participation in the criminal justice system; it undermines as well public confidence in the legitimacy and fairness of that system. But it does not follow that these are the primary values implicated by this unconstitutional practice.

Common sense suggests that the rule of Batson is neither a mere prophylactic--like those at issue in Johnson v. New Jersey, 384 U.S. 719 (1966), and Shea v. Louisiana -- nor a product solely of policy concerns extrinsic to the accuracy and reliability of the trial process--like those at issue in Linkletter and

United States v. Johnson. Rather, like the rule against coerced confessions, it serves "a complex of values," Blackburn v. Alabama, 361 U.S. 199, 207 (1960), some of which bear heavily on the truth-finding process and, therefore, mandate retroactive effect. Linkletter, 381 U.S. at 638; see, e.g., Arsenault v. Massachusetts, 393 U.S. 5 (1968).

This is clear when one considers the nature of the practice that Batson condemned. Prosecutors who used their peremptory challenges to strike black potential jurors did so not primarily out of blind racial animus; they did so because they believed that it affected the outcomes of their cases. Thus, one prosecutor testified about his former practice and the reasons for his change:

> So we made a determination that we were not going to in any way discriminate against blacks; we were going to try to keep black jurors..., and the longer we tried that, the more discouraged we got about it.... We just had to abandon

> that philosophy. * * * And the defense attorneys can tell you very well when that happened, because it's when they started losing more cases.

Edwards v. Thigpen, Civil Action No. J 83-0566(B)(S.D. Miss.), Deposition of Edward J. Peters at 31, 34 (April 12, 1985).

All jurors are not fungible; the deliberate exclusion of minorities from criminal juries has a direct and demonstrable effect on the actual outcomes of criminal cases. The reasons are readily apparent when one considers both what a jury does and how it does it.

It is simplistic to view the jury solely as the finder of "facts" subject to measurement by some objective standard of "truth" or "falsity." Hardly any criminal case is so one-dimensional. Nor is the jury's judgment limited to the binary alternatives of "guilt" or "innocence." "[T]he jury plays a political function in the administration of the law...." Taylor v. Louisiana, 419 U.S. 522, 529 (1975). "It

must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." Id. at 26 n. 37 (quoting H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. AND AD. NEWS 1792, 1797, the House Report on the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq.).[4]

The jury functions in part by invoking its values to express the community's judgment of the severity of the offense and the moral culpability of the offender. Cf. Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 608-09 (1986)(grand jury). It

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[4] As Justice Rehnquist has observed: "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passionate elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 341-42 (1979)(Rehnquist, J., dissenting) (quoting O. Holmes, COLLECTED LEGAL PAPERS 237 (1920)).

may do so in obvious ways, as when it chooses between guilt of the crime charged or of a lesser included offense. See Keeble v. United States, 412 U.S 205 (1973). Or it may do so in less obvious ways when it treats the variety of factual and mixed factual-legal decisions with which it is regularly confronted.

This becomes clear when one considers the multi-dimensional nature of even a simple criminal case. For example,

> [i]magine a manslaughter charge arising out of reckless driving. The decision-maker must determine the truth of a certain number of propositions regarding "external facts," such as the speed of the automobile, the condition of the road, the traffic signals, the driver's identity, and so on. ... The inquiry here appears to be relatively objective, and the truth about such facts does not seem to be too elusive.
>
> But many "internal facts" will also have to be established.... They regard aspects of the defendant's knowledge and volition.... The ascertainment of such facts is already a far less objective undertaking than the ascertainment of facts derived by the senses....

> The situation changes, however, when the facts ascertained must be assessed in the light of the legal standard. Whether a driver has deviated from certain standards of care -- and if so to what degree -- are problems calling for a different type of mental operation than that used in dealing with external facts.

Damaska, Presentation of Evidence and Fact-finding Precision, 123 U.Pa.L.Rev. 1083, 1085-86 (1975). The impact on the decision-making process of the exclusion of minorities must be understood at each level of the truth-finding process.

The exclusion of minority jurors will inevitably result in the exclusion of perspectives and values not otherwise represented. This will have obvious impact on the qualitative decisions regarding intent and the application of legal standards to the facts of the case. But even at the first, most objective level -- that of "external facts" -- the exclusion of minorities will have a skewing effect on

the accuracy of factfinding in several distinct ways.[5]

A jury is often called upon to ascertain facts on the basis of the credibility of the witnesses. In a case involving a black defendant -- or, as in Griffith, a black defendant and white victims -- the array of witnesses will often divide on racial lines. In assessing their credibility on the basis of their demeanor, for example, it matters a great deal if there are blacks on the jury who are accustomed to the habits of speech and mode of presentation exhibited by the

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[5] One study found that, when showed a picture of a white person armed with a razor apparently arguing with a black man, over half of the subjects reported that it was the black man who held the razor. G. Allport & L. Postman, THE PSYCHOLOGY OF RUMOR 111 (1965), discussed in Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1645 (1985).

defendant that might be unfamiliar or even threatening to white jurors.[6]

The perception of primary, "external facts" is also affected by the values brought to the jury room. The Court recognized as much in Adams v. Texas, 448 U.S. 38 (1980) -- where the value at issue was the jurors' scruples against the death penalty. There, the Court acknowledged that the jurors' values "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable

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[6] See Peters v. Kiff, 407 U.S. 493 (1972)(plurality opinion):

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude ... that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 503-04.

doubt. Such assessments and judgments by jurors are inherent in the jury system. ..." Id. at 50.

This conclusion, of course, has strong empirical foundations in the work of Professors Kalven and Zeisel, H. Kalven, Jr., & H. Zeisel, THE AMERICAN JURY (1966). In their study of judge-jury disagreements, they found that

> to a considerable extent, or in exactly 45 per cent of the cases, the jury in disagreeing with the judge is neither simply deciding a question of fact nor simply yielding to a sentiment or values; it is doing both. It is giving expression to values and sentiments under the guise of answering questions of facts.

Kalven & Zeisel, supra, at 116.[7]

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[7] Thus, what may look apparent to a reviewing court may have seemed very different to the jurors who heard all the testimony and wrestled with the facts in light of community values. "[T]he more one is removed from the fullness of life, the more limited but also the more precise is our knowledge: there is one fixed perspective. On the other hand, the closer one remains to the complexity of real life processes, the more encompassing but also the less certain is one's understanding: as in cubism, our sensations come from

Moreover, the very nature of the reasonable doubt standard means not only that the jury will necessarily call upon its values, but also that an individual juror will make a difference. Kalven and Zeisel found that juries by and large have a higher threshhold of reasonable doubt than do judges, but they did not ascribe that difference to any "distinctive value[s] held by laymen." Kalven & Zeisel, supra, at 189 n. 5. Rather, they concluded that if a jury "decides close cases with a higher cut-off point than does a single judge, the explanation may reside in the unanimity requirement. The jury, to avoid disagreement, would tend in the direction of its most stringent member." Id. Thus, the exclusion of a single minority juror who holds a more stringent view of "what [he] may deem to be a reasonable doubt...,"

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multiple viewpoints and there is more than one side to every story." Damaska, supra, at 1104.

Adams v. Texas, 448 U.S. at 50, will have a profound impact on the jury's decision-making process. This affects the truth-finding process in a manner so vital as to command retroactive application. See Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972).

The improper exclusion of even a single minority juror will have an actual impact on the outcome of the jury verdict in other empirically demonstrable ways. For example, Kalven and Zeisel found that the incidence of hung juries depends on the number of dissenting jurors: "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. ... To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally." Kalven & Zeisel, supra, at 463.

Thus, the use of peremptory challenges to exclude a single minority juror could literally spell the difference between conviction, on one hand, or a hung jury resulting ultimately in acquittal, on the other. See Brown v. Louisiana, 447 U.S. at 332 & n. 10.

The Court need not speculate on this matter, for the records in each of the cases before it provide eloquent demonstrations of the impact of this practice on actual juries. In Brown, the Assistant United States Attorney testified that the reason he used his peremptories to strike blacks was that a previous case in which he did not do so ended in a hung jury. Appendix D to the Petition for Certiorari in No. 85-5731, at 20.

Griffith provides an even more compelling example. There, the key issue was a questionable cross-racial

identification.[8] Mr. Griffith was tried twice. He was convicted by a jury from which blacks were purged by the prosecutor's use of peremptory challenges. But the first trial, at which the prosecutor struck only three of the four blacks on the venire, ended in a hung jury.

The exclusion of a single minority juror can have an actual impact on the ultimate verdict in another way. Kalven and Zeisel found "that with very few exceptions the first ballot decides the outcome of the verdict." Kalven & Zeisel, supra, at 488 (emphasis in original). The effect of the initial vote was quite precise, and revealing: an initial vote of 7-5 to convict resulted in a verdict of "guilty" 86% of the time; an initial vote of 7-5 to acquit resulted in a verdict of "innocent"

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[8] Mr. Griffith testified and denied guilt. One of the white victims, who positively identified him as the assailant, also testified that she saw him on the street two weeks after the crime -- at a time when Mr. Griffith was in jail awaiting trial.

91% of the time; and an initial vote of 6-6 made the ultimate result a toss-up: "the final verdict falls half the time (it so happens, exactly half the time) in one direction and half in the other." Id. The impermissible purging of a single minority juror can shift the balance on the initial vote in a way that in fact determines the outcome.

"Thus, it makes a good deal of difference in this decision-making who the personnel are." Kalven & Zeisel, supra, at 496; see also Ballard v. United States, 329 U.S. 187, 194-95 (1946). Indeed, the identity of the jurors is more important to the outcome than the deliberation process. Kalven & Zeisel, supra, at 496. Thus, the fact that the remaining jurors may themselves be fair and impartial "does nothing to allay our concern about the reliability and accuracy of the jury's verdict." Brown v. Louisiana, 447 U.S. at

333. "Any practice that threatens the jury's ability to perform that function poses a similar threat to the truth-determining process itself. The rule in [Batson] was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application." Id. at 334.[9]

B. The Reliance by Prosecutors on Swain Does Not Support Prospective Application of the Standards Enunciated in Batson

Batson was not the kind of "clear break" with past precedent that would warrant prospective application. First, Batson did not purport to change the substantive standard governing the use of peremptory challenges by prosecutors. To

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[9] DeStefano v. Woods, 392 U.S. 631 (1968), is not to the contrary. It is one thing to say that a judge's determinations are no less accurate and reliable than a jury's. But it is quite another to provide a jury and then ignore the fact that it has been tampered with in ways affecting directly its decision-making function. See Brown, 447 U.S. at 334 n. 13.

the contrary, it began its analysis with the observation that "Swain ... recognized that a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" Batson, 90 L.Ed.2d at 79 (quoting Swain v. Alabama, 380 U.S. at 203-04).

Although Batson did of course overrule Swain in part, it did so only with regard to the mode of proof to be employed in proving discriminatory use of the peremptory challenge. If prosecutors relied on the Swain standards, they relied on those standards not to justify their conduct but merely to insulate their knowingly impermissible conduct from effective review. This is not the kind of "good-faith reliance," Brown v. Louisiana, 447 U.S. at 335; DeStefano v. Woods, 392 U.S. 631, 634 (1968), that justifies

eternal insulation by means of a prospectivity rule.[10]

> No prosecutor could have been unaware
>
> that racial discrimination ... violates deeply and widely accepted views of elementary justice.... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination....

Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983). Thus, in every case in which the defendant, pursuant to Batson, makes a prima facie case that the prosecutor used peremptory challenges to eliminate blacks for impermissible motives, it is necessarily true that there is reason to believe that the prosecutor knowingly

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[10] Certainly, no prosecutor who tried a case subsequent to the decisions respecting the denial of certiorari in McCray v. New York, 461 U.S. 961, 963 (1983)(Marshall and Brennan, JJ., dissenting from the denial of certiorari); id. at 961 (Stevens, Blackmun, and Powell, JJ., opinion respecting the denial of certiorari), could fail to be on notice that the practice was constitutionally suspect.

committed "a grave constitutional trespass." Vasquez v. Hillery, 88 L.Ed.2d at 608.

Second, even Batson's change in the evidentiary standard was not a "clear break" with past law. The Court's review in Batson of its intervening decisions regarding proof of impermissible racial motive conclusively demonstrates that Batson was foreshadowed in a host of cases. Where Swain had indicated that "an inference of purposeful discrimination would be raised on evidence that a prosecutor, 'in case after case, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes...,'" Batson, 90 L.Ed.2d at 84 (quoting Swain, 380 U.S. at 223), Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), had made clear

> that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."

Batson, 90 L.Ed.2d at 87 (quoting Arlington Heights, 429 U.S. at 266, n. 14); see also Alexander v. Louisiana, 405 U.S. at 629-31.

Moreover, "[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain." Batson, 90 L.Ed.2d at 87. It was "[t]hese principles" -- spelled out in the Court's cases from 1972 onward[11] -- which supported the "conclusion that a defendant may establish a prima facie case of

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[11] The Court cited and discussed Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(Title VII); Washington v. Davis, 426 U.S. 229, 241-42 (1976); and Castaneda v. Partida, 430 U.S. 482, 494-95 (1977), as articulating the evidentiary standards to be applied. Batson, 90 L.Ed.2d at 87-88.

purposeful discrimination in selection of the petit jury solely on the evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id.

C. The Potential Effect on the Administration of Justice is not so Overwhelming as to Override the Foregoing Factors

The balance of considerations raised by the concern for the effect of Batson on the administration of justice is not so overwhelming as to override the concern for accuracy in the jury's decision-making process.

First, it is not clear that this factor points only in the direction of prospectivity. There are cases that raise the issue of discriminatory use of peremptories on records that meet the standards of either Batson or Swain. See, e.g., Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986). Indeed, Brown may well be just such

a case.[12] It would be not only anamolous but wasteful to require the lower courts to hear such petitioners present the "case after case" evidence required by Swain when their claims might be proved more efficiently under the Batson standards.

Second, it is not at all clear that the number of Batson claims that properly were preserved in the state courts is so high that a general jail delivery is to be feared. See Wainwright v. Sykes, 433 U.S. 72 (1977); Hankerson v. North Carolina, 432 U.S. at 244 n. 8. For those who did not perserve the claim, it is unlikely that

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[12] In his concurring opinion in Batson, Justice White explained that even under Swain it would be proper for a trial judge to invalidate the prosecutor's use of peremptories in a case in which he or she admitted to doing so on the basis of race, especially if the defendant is black. Batson, 90 L.Ed.2d at 90 n. *. In Brown, the Assistant United States Attorney ultimately admitted to the trial judge that: "I said 'We would like to have as few black jurors as possible,' which is exactly either I'm sure what I said or close to it...." Appendix D to the Petition for Certiorari in No. 85-5731, at 70.

they will be able to show cause; the very cases that warned prosecutors of the illegality of the practice also provided the tools for competent counsel to raise and preserve the claim. See Engle v. Isaac, 456 U.S. 107 (1982). Moreover, the lower courts may properly limit consideration to only those cases in which there is an adequate proffer of evidence to suggest a prima facie case. See. e.g., Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986) (state court found that no Spanish-surnamed jurors were struck).

In any event, the Court has never held that a practice which strongly implicates the truth-finding process will nevertheless be given retroactive condonation simply because of the the widespread nature of the violation. See Hankerson v. North Carolina, 432 U.S. at 243.

II. THE NATURE OF THE SENTENCING DECISION IN CAPITAL CASES IS SUCH THAT THE EXCLUSION OF MINORITIES FROM THE JURY NECESSARILY DIMINISHES ITS RELIABILITY, REQUIRING RETROACTIVE APPLICATION OF BATSON TO CAPITAL SENTENCING PROCEEDINGS

The nature of the capital sentencing decision made by a jury calls for the retroactive application of Batson because of the "unacceptable risk ... infecting the capital sentencing proceeding...," Turner v. Murrray, 476 U.S. ___, 90 L.Ed.2d 27, 37 (1986) (emphasis in original), that results from the exclusion of minorities from sentencing juries. This unacceptable risk arises in two separate ways.

"In a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" Turner, 90 L.Ed.2d at 35 (quoting Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 247 n. 7 (1985), and

Zant v. Stephens, 462 U.S. 862, 900 (1983)(Rehnquist, J., concurring)). Because "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing..., sentencers will exercise their discretion in their own way and to the best of their ability." Barclay v. Florida, 463 U.S. 939, 950(1983)(plurality opinion). "The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id. at 970 (Stevens and Powell, JJ., concurring).

Given the inherently subjective, value-laden nature of the capital sentencing determination, there is risk of substantial inaccuracy and unreliability in the death verdict imposed or recommended by a jury from which minorities were purged. This risk arises in two ways. First, "[b]ecause of the range of discretion entrusted to a

jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner, 90 L.Ed.2d at 35. The impermissible removal of black potential jurors from the jury room removes one of the best -- if not the best -- means of curbing such abuse: The presence of a black juror provides both a means to unmask prejudice should it creep into the jury room and a powerful deterrent against its entry.

Second, the very function of a jury in a capital case is to serve as a "link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'" Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion)(quoting Trop v. Dulles, 356 U.S.

86, 101 (1958)). That link is destroyed when important segments of the community are deliberately and impermissibly excluded. All the reasons that demonstrate that the exclusion of blacks from the guilt/innocence stage of the trial affects the decision-making process apply with greater force to the sentencing decision, which more openly calls for the exercise of discretion and the interpolation of values in the application of the law.

The Court recognized as much in Witherspoon v. Illinois, 391 U.S. 510 (1968) -- concerning the exclusion of individual jurors because of their values regarding capital punishment -- where it held that decision entirely retroactive. Id. at 523 n. 22. See also Davis v. Georgia, 429 U.S. 122 (1976) (improper exclusion of single Witherspoon juror requires reversal). So too, in capital cases in which the prosecution used its

peremptories impermissibly to remove blacks --and to a much greater degree -- "the jury selection standards employed ... necessarily undermined 'the very integrity of the ... process' that decided the petitioner's fate ... requiring the fully retroactive application of..."[13] Batson to capital sentencing proceedings.

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[13] Witherspoon, 391 U.S. at 523 n. 22 (quoting Linkletter, 381 U.S. at 639).

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be reversed.

Respectfully submitted,

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